In the

United States Court of Appeals

For the Seventh Circuit

No. 12031

UNITED STATES OF AMERICA ex rel.
STATE OF WISCONSIN,

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION and FEDERAL HOME
LOAN BANK BOARD,

APPENDIX FOR PLAINTIFF APPELLANT

INDEX

Prefix to Record 1

Petition for leave to file an Information in the nature of Quo Warranto and for Rule to show cause 2

Proposed Information in the nature of Quo Warranto 4

Rule on First Federal Savings and Loan Association to show cause why leave to file proposed Information should not be granted, entered Dec. 6, 1965 9

Order of Feb. 21, 1966, granting leave to file Information 10

Answer to Information 11

Intervenor's Motion to dismiss Information 13

Order of Feb. 22, 1966, following Pre-trial Conference 15

First Amendment to Answer 17

Notice and Motion of United States and Federal Home Loan Bank Board for leave to intervene 19

Points and Authorities in support of Motion 21

Notice and Motion of United States and Federal Home Loan Bank Board to dismiss Information 23

Memorandum of points and authorities in support of motion 24

[illegible] 25

[illegible] 26

[illegible] 27

[illegible] 28

[illegible] 29

[illegible] 30

Order of Mar. 18, 1957, granting Motion of First Federal Savings and Loan Association and Federal Home Loan Bank Board for judgment of dismissal as to them and denying Plaintiffs' motion for summary judgment 47
Opinion by Tehan, J., filed Mar. 18, 1957..... 47
Judgment of dismissal, entered Mar. 19, 1957..... 68
Order of April 17, 1957, approving security for costs on appeal 69
Notice of Appeal..... 70
Certificate of Clerk..... 71

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

United States of America ex rel.
State of Wisconsin,
Plaintiff-Appellant,
vs.
First Federal Savings and Loan
Association,
Defendant-Appellee,
Federal Home Loan Bank Board,
Intervening Defendant-Appellee.

PREFIX TO RECORD.

The above action was commenced on December 6, 1954 by the State of Wisconsin against the First Federal Savings and Loan Association. On March 16, 1956 the Federal Home Loan Bank Board asked leave to intervene and on March 29, 1956 the Federal Home Loan Bank Board was granted leave to intervene. The respective pleadings were filed on the dates indicated on the Index to the Record. On motion of the defendants, the Court dismissed the proceedings on March 19, 1957. Notice of Appeal was filed April 7, 1957 by the State of Wisconsin.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

United States of America ex rel. State of Wisconsin, *Plaintiff*, v. First Federal Savings and Loan Association, *Defendant.*	Civil Action No. 647

PETITION FOR LEAVE TO FILE AN INFORMATION IN THE NATURE OF QUO WARRANTO AND FOR A RULE TO SHOW CAUSE.

(Filed Dec. 6, 1954. B. H. Westfahl, Clerk.)

The petition of the plaintiff herein upon the relation of the State of Wisconsin, acting through its Attorney General Vernon W. Thomson, respectfully represents and shows to the court:

1. That the defendant herein, First Federal Savings and Loan Association of Milwaukee, a federally chartered association, has publicly asserted and continues to assert that it has some charter or franchise whereby it has the right to establish receiving stations in connection with its savings and loan business in the city of Milwaukee.

2. That no charter has been issued to said defendant by the plaintiff herein nor by any other governmental agency known to plaintiff or your relator which contains any valid provision conferring upon defendant such right or franchise.

3. That the establishment of such receiving stations is flatly prohibited by the provisions of sec. 215.02 (20) of the Statutes of the State of Wisconsin.

2 4. That the details of said usurpation of authority are set forth in summary form in the proposed information which is annexed hereto and made a part hereof by reference, the same as if set forth in full in this petition.

Wherefore, Petitioner prays that a rule issue out of this honorable court directed to defendant ordering and directing defendant to show cause, if any it has, why leave should not be granted to file an information in the nature of a quo warranto in the form and style of the information annexed hereto.

Dated this 3rd day of December, A. D. 1954.

VERNON W. THOMSON,
Attorney General of Wisconsin,
STEWART G. HONECK,
Deputy Attorney General,
HAROLD H. PERSONS,
Assistant Attorney General,
ROY G. TULANE,
Assistant Attorney General,
Attorneys for Plaintiff State of Wisconsin.

Verification.

State of Wisconsin, } ss.
County of Dane. }

Stewart G. Honeck, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioner named in the foregoing petition, that he has read the said petition and that the same is true to his
3 own knowledge, that the source of his knowledge is an examination of the rules and regulations of the Home Loan Bank Board and information conveyed to him in the course of his duties by officials of the State of Wisconsin.

That the reason that this verification is not made by relator is that the relator is a sovereign state and can act only through its agents.

STEWART G. HONECK.

Subscribed and sworn to before me this 3rd day of December, A. D. 1954.

Iona Farrell,
Notary Public,
Dane County, Wisconsin.

(Seal)

My Commission expires Feb. 24, 1957.

4 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—6475) * *

PROPOSED INFORMATION IN THE NATURE OF QUO WARRANTO.

(Filed Dec. 6, 1954. B. H. Westfahl, Clerk.)

The United States of America upon the relation of the State of Wisconsin acting through its Attorney General Vernon W. Thomson, and at the request of its Governor Walter J. Kohler, respectfully informs the court as follows:

1. That the relator State of Wisconsin is one of the 48 sovereign states of the United States of America; that said relator has a two-fold interest in this proceeding, one as *parens patriae*, or representative of the public, and two, as operator and trustee of the veterans housing fund of the State of Wisconsin which has outstanding almost $30,000,000 in loans upon homes of veterans in the State of Wisconsin; that most of said loans are secured by second mortgages which are junior to first mortgages held by state and federally chartered savings and loan institutions and other supervised lending agencies; that the security of said second mortgages is dependent upon the maintenance of

a sound system of financial institutions in the State of Wisconsin.

2. That the defendant First Federal Savings and Loan Association of Milwaukee, Wisconsin, doing business at 730 North Water Street, is an association chartered by the United States of America on February 20, 1934 under the provisions of section 5 of the Home Loaners Act of 1933 as amended, 12 U. S. C. A. §1464, and the Rules and Regulations for Federal Savings and Loan Associations adopted by the Federal Home Loan Bank Board, which, by virtue of various federal reorganizations is now known and designated as the Home Loan Bank Board.

3. That by the provisions of the organic act, section 5 of the Home Owners Loan Act of 1933 as amended, the original Federal Home Loan Bank Board was required by the Congress of the United States, in promulgating its regulations to give primary consideration to the best practices of local mutual thrift and home financing institutions in the United States, to refuse to grant a charter without a determination of the Board itself that a need existed for an association in the particular community to be served, and to find that such association could be established without injury to existing local savings and loan and other home financing institutions.

4. That in many localities of the United States including the State of Wisconsin the practices found best for the maintenance of a sound system of local home financing institutions forbade the establishment of branch agencies including both branch banks and branch agencies of savings and loan associations, and forbade the establishment of an agency of any kind without any examination and approval, by some properly authorized government agency, of its proposed location in regard to the location of existing agencies; that the soundness of conforming federal law to local practices has been recognized by the Congress

itself in regard to national banks by the provisions of the McFadden Act, which reads in part, Title 12 U. S. C. A. § 36(c):

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such etsablishment and operation are at the time expressly authorized to state banks by the law of the State in question; [here follow similar provisions]"

5. That notwithstanding the express directive from the Congress of the United States the Federal Home Loan Bank Board in promulgating its original rules for the granting of charters to federal savings and loan associations not only ignored the fact that the best practices in many localities forbade the establishment of branch agencies, but in regard to certain agencies known as receiving agencies absolutely and completely abdicated its responsibility to pass upon the number and location of such agencies as might be established; that the said board attempted to subdelegate the powers which had been delegated to it by the Congress to each and all of the federally chartered associations themselves.

6. That the provision of its rules and regulations by which this subdelegation of delegated authority was attempted is regulation No. 145.15 which reads in part:

> "A Federal Association may, without approval by the Board, establish or maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned or to any combination of such functions, * * *"

That said purported rule is null and void in that it is beyond the powers delegated to the Home Loan Bank Board by Congress and is an invalid subdelegation of the

powers of the board itself, and hence is not a part of the charter issued to defendant by the United States.

7. That the establishment of branch or receiving agencies of savings and loan associations in the state of Wisconsin is prohibited by sec. 215.02 (20) of the Statutes of the State of Wisconsin which reads:

> "One Office Only. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

That there is no federal statute or valid federal regulation contrary to the foregoing state statute; that there is no paramount federal regulation within the meaning of the rule in *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 44 S. Ct. 213, 68 L. ed. 486, and hence the state statute is controlling.

8. That notwithstanding the lack of power to do so under its charter from the United States, and in spite of the prohibitions against such action in the controlling statutes of the state of Wisconsin, defendant has announced its intention to, made preparation to, and has established three receiving agencies in the county of Milwaukee on the first day of November, 1954, located at 4433 W. Fond du Lac Avenue, Milwaukee, Wisconsin, 925 Milwaukee Avenue, South Milwaukee, Wisconsin, 6000 West Oklahoma Avenue, Milwaukee, Wisconsin, and that it will continue to maintain such stations unless restrained therefrom by this honorable court.

9. That in so asserting the right to maintain receiving agencies defendant is asserting and usurping a prerogative and franchise not conferred upon it by its charter, and is invading the sovereign prerogatives of the plaintiff herein by whom the said charter was granted. That by so abusing the franchise granted to it by its charter it has

forfeited all right entitled thereto and is subject to a judgment of ouster in favor of the sovereign.

10. That under date of October 29, 1954 your petitioner made a formal demand upon the Attorney General of the United States that he filed an information in the nature of a quo warranto against the defendant herein for the purpose of securing a judgment of ouster based on the usurpations above described. That by letter dated November 5, 1954 the Attorney General of the United States formally declined to file such an information.

Wherefore, Relator respectfully prays that the defendant make its return before this honorable court stating and declaring by what right it asserts a charter and franchise to establish receiving stations in the state of Wisconsin and county of Milwaukee at a distance from its principal location, and that in default thereof a judgment of ouster issue vacating and forfeiting the charter asserted by respondent.

Dated this 3rd day of December, A. D. 1954.

Vernon W. Thomson,
Attorney General of Wisconsin,

Stewart G. Honeck,
Deputy Attorney General,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,
Attorneys for Plaintiff,
State of Wisconsin.

9 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

RULE TO SHOW CAUSE.

(Filed Dec. 6, 1954. B. H. Westfahl, Clerk.)

Upon reading and filing the petition of the United States of America upon the relation of the State of Wisconsin, and the proposed information annexed thereto, and upon motion of the Attorney General of Wisconsin

It Is Ordered

That the defendant herein named, First Federal Savings and Loan Association, show cause if any it has before this Honorable Court on the 27th day of December, A. D. 1954, at 2 o'clock P. M. in the court room of the United States District Court in Milwaukee, Wisconsin, why leave to file the proposed information should not be granted.

Let a copy of this rule be served upon the defendant herein forthwith.

Dated, December 6, 1954.

Robert E. Tehan,
District Judge for the Eastern District of Wisconsin.

Eastern District of Wisconsin } ss:

I hereby certify and return that I served the within Rule To Show Cause on the within named First Federal Savings and Loan Association by delivering to and leaving with C. J. Vogt, Vice President personally a true copy thereof this 14th day of December, A. D. 1954 at 730 North Water Street, Milwaukee, Wisconsin.

Service—$2.00.

Clemens F. Michalski,
U. S. Marshal,
By Russell C. Knight,
Deputy U. S. Marshal.

10 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

ORDER.

(Filed Feb. 10, 1956. Dale E. Ihlenfeldt, Clerk.)

The plaintiff having filed a petition herein upon the relation of the State of Wisconsin, acting through its Attorney General Vernon W. Thomson, for leave to file an information in the nature of quo warranto, requiring the defendant to declare by what right it asserts a charter and franchise to establish receiving stations in the State of Wisconsin and County of Milwaukee at a distance from its principal location, and in default thereof asking that a judgment of ouster issue vacating and forfeiting the charter asserted by the respondent;

And said petition having come on to be heard, and the Court having heard the arguments of counsel, and having considered the record in this matter and the briefs submitted by the parties;

And the Court being of the opinion that the sole question presently before the Court is whether or not there is a substantial issue presented which should be subject to a judicial determination with a full opportunity for both parties to be heard;

11 And the Court being further of the opinion that a substantial issue is presented and that in the exercise of sound discretion, leave should be granted to the petitioner to file its proposed information in the nature of quo warranto;

Now, Therefore, It Is Ordered: That the petitioner be and hereby is granted leave to file its information in the nature of quo warranto.

It Is Further Ordered: That the defendant shall have twenty (20) days from the date of this order in which to answer or otherwise plead.

Dated, Milwaukee, Wisconsin, this 10th day of February, 1956.

Robert E. Tehan,

U. S. District Judge.

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d), F. R. C. P., and Rule 21-A of District Court.

12 In the United States District Court.

* * (Caption—6475) * *

ANSWER.

(Filed Feb. 17, 1956. Dale E. Ihlenfeldt, Clerk.)

Now comes the defendant, First Federal Savings and Loan Association of Wisconsin, in the above stated case, and, subject to its motion to dismiss, heretofore filed, files this as its answer and says that:

1. Defendant admits that the State of Wisconsin is one of the forty-eight sovereign states of the United States of America, and denies the remainder of said paragraph.
2. Paragraph 2 is denied.
3. Paragraph 3 is admitted.
4. Paragraph 4 is denied.
5. Paragraph 5 is denied.
6. Defendant admits the quotation in paragraph 6 from Section 145.15 of the Rules and Regulations for Federal Savings and Loan Associations, and denies the remainder of said paragraph.
7. Defendant admits Section 215.02 (20) of the Statutes of the State of Wisconsin, as quoted, and denies the remainder of said paragraph.

13 8. Defendant admits the establishment of agencies at the locations stated, but denies that they are "receiving agencies" and says that the same were established and are operated pursuant to Section 145.15 of the Rules and Regulations for Federal Savings and Loan Associations and specifically, pursuant to that portion thereof quoted in paragraph 6 of the Information in the nature of a quo Warranto and not otherwise.

9. Paragraph 9 is denied.

10. For lack of sufficient information, the defendant neither admits nor denies the allegations of paragraph 10.

Wherefore, defendant prays that it be discharged hence with its costs.

Horace Russell,
Attorney for Defendant,
7 S. Dearborn St., Chicago 3, Ill.

Jack C. Werner,
Attorney for Defendant,
741 N. Milwaukee St.,
Milwaukee 2, Wis.

14 State of Illinois, } ss:
County of Cook. }

Horace Russell, being first duly sworn, deposes and says that he served foregoing Answer upon the following named parties:

Vernon W. Thomson, Esq.,
Attorney General for State of Wisconsin,
Madison, Wisconsin.

Stewart G. Honeck, Esq.,
Deputy Attorney General for State of Wisconsin,
Madison, Wisconsin.

Harold H. Person, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin.

Roy G. Tulane, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin.

Jack C. Werner, Esq.,
741 North Milwaukee St.,
Milwaukee 2, Wisconsin.

Edward G. Minor,
United States Attorney,
Milwaukee 2, Wisconsin.

by mailing copies of the same to each of said parties, at the addresses stated above, by depositing the envelopes, postage prepaid, properly addressed, in the mail chute at 7 South Dearborn Street, Chicago 3, Illinois, at 10:00 o'clock A. M. Thursday, February 16, 1956.

Horace Russell.

Subscribed and sworn to before me this 16th day of February, 1956.

Alice Morrissey,
Notary Public.

(Seal)

15 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MOTION.

(Filed Feb. 17, 1956. Dale E. Ihlenfeldt, Clerk.)

Now comes the defendant, First Federal Savings and Loan Association of Wisconsin, and moves the Court to dismiss the information in the nature of quo warranto stated above on the grounds that:

1. This Court has no jurisdiction of such action.
2. The plaintiff states no cause of action.
3. The Congress delegated to the Federal Home Loan Bank Board full power to make rules and regulations for the organization, operation and liquidation of Federal Savings and Loan Associations and to administer the statute and rules and regulations affecting them and to adjudicate disputes arising thereunder, and the plaintiff can have no standing in this Court until administrative remedies have been exhausted, and the pleadings in this case do not show that administrative remedies have been exhausted.

Wherefore, the defendant prays that the proceedings be dismissed.

Horace Russell,
Attorney for Defendant,
7 S. Dearborn St.,
Chicago 3, Ill.,

Jack C. Werner,
Attorney for Defendant,
741 N. Milwaukee St.,
Milwaukee 2, Wis.

16 State of Illinois, } ss.
County of Cook. }

Horace Russell, being first duly sworn, deposes and says that he served foregoing Motion upon the following named parties:

Vernon W. Thomson, Esq.,
Attorney General for State of Wisconsin,
Madison, Wisconsin;

Stewart G. Honeck, Esq.,
Deputy Attorney General for State of Wisconsin,
Madison, Wisconsin;

Harold H. Person, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin;

Roy G. Tulane, Esq.,
Assistant Attorney General for State of Wisconsin,
Madison, Wisconsin;

Jack C. Werner, Esq.,
741 North Milwaukee St.,
Milwaukee 2, Wisconsin;

Edward G. Minor,
United States Attorney,
Milwaukee 2, Wisconsin;

by mailing copies of the same to each of said parties, at the addresses stated above, by depositing the envelopes, postage prepaid, properly addressed, in the mail chute at 7 South Dearborn Street, Chicago, 3, Illinois, at 10:00 o'clock A. M. Thursday, February 16, 1956.

Horace Russell.

Subscribed and sworn to before me this 16th day of February, 1956.

Alice Morrissey,
Notary Public.

(Notarial Seal)

17 UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

ORDER FOLLOWING PRE-TRIAL CONFERENCE.

(Filed Feb. 23, 1956. Dale E. Ihlenfeldt, Clerk.)

The parties having appeared by their respective counsel at a pre-trial conference in the above matter, held, pursuant to notice, on February 23, 1956, and said counsel having so agreed,

It Is Ordered: That the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustices:

1. On March 8, 1956, at 10:00 o'clock A. M., relator will take the depositions of the manager of defendant's "service stations" and of one of the office secretaries thereof.

2. Not later than March 20, 1956, relator will move for summary judgment submitting therewith a brief or a statement that no brief will be filed.

3. Not later than March 27, 1956, defendant will file its answering brief.

4. On March 29, 1956, at 2:00 o'clock P. M., the court will hear oral arguments on the motion for summary judgment and the merits of the case.

Dated, Milwaukee, Wisconsin, this 23rd day of February, 1956.

Robert E. Tehan,
U. S. District Judge.

18 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

FIRST AMENDMENT OF ANSWER.

(Filed Mar. 16, 1956. Dale E. Ihlenfeldt, Clerk.)

Now comes the defendant, First Federal Savings and Loan Association of Wisconsin, in the above case, and amends Paragraph 2 of its Answer to read as follows:

"2. Paragraph 2 is admitted."

Wherefore, defendant prays that this amendment be allowed.

Horace Russell,
Attorney for Defendant,
7 S. Dearborn St.,
Chicago 3, Ill.,

Jack C. Werner,
Attorney for Defendant,
741 N. Milwaukee St.,
Milwaukee 2, Wis.

The foregoing Amendment presented and allowed, subject to objections, and ordered to be filed this 16th day of March, 1956.

Robert E. Tehan,
United States Judge.

19 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

NOTICE OF MOTION BY THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE AND POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION BY THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE.

(Filed Mar. 16, 1956. Dale E. Ihlenfeldt, Clerk.)

To: Honorable Vernon W. Thomson,
Attorney General for State of Wisconsin,
Madison, Wisconsin;

Messrs. Russell and Bridewell,
Attorneys at Law,
7 South Dearborn Street,
Chicago 3, Illinois;

Mr. Jack Werner,
Attorney at Law,
741 North Milwaukee Street,
Milwaukee 2, Wisconsin.

Please Take Notice: That the attached Motion by the United States and the Federal Home Loan Bank Board for Leave to Intervene and Points and Authorities in Support of the Motion by the United States and the Federal Home Loan Bank Board for Leave to Intervene will be brought on for hearing at a time to be designated by the Clerk of Court before the Honorable Robert E. Tehan, United States District Judge, in his Court Room, Federal Building, Milwaukee, Wisconsin.

Dated this 16th day of March, 1956.

Edward G. Minor,
United States Attorney,
Attorney for Plaintiffs.

20 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

MOTION BY THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE.

Pursuant to Rule 24, Federal Rules of Civil Procedure, the United States and the Federal Home Loan Bank Board, an agency in the executive branch of the United States, move the Court for leave to *intervene in this action* in order to assert their interests affected by this action.

This case involves two important issues of public law: (1) whether the State of Wisconsin has authority to use the name of the United States in maintaining an action in the nature of quo warranto; and (2) the validity of regulation of the Federal Home Loan Bank Board permitting the establishment of agencies by federal savings and loan associations, which issue involves the construction of an Act of Congress.

This intervention for the purpose of submitting the views of the executive branch of the Government will in no way prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

21 Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice, Attorneys for the United States and the Federal Home Loan Bank Board.

22 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—6475) • •

POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF THE UNITED STATES AND THE FEDERAL HOME LOAN BANK BOARD FOR LEAVE TO INTERVENE.

The United States requests permission to intervene because this action involves the important question of whether the State of Wisconsin has authority to use the name of the United States in maintaining an action in the nature of quo warranto. Congress has provided that the interests of the United States, when involved in any law suit, shall be represented by the Attorney General of the United States or other officials of the Department of Justice. 5 U. S. C. 309, 316. It is the duty of United States Attorneys to prosecute "for the Government, all civil actions, suits or proceedings in which the United States is concerned." 28 U. S. C. 507. The United States contends that the State of Wisconsin has no authority to bring this proceeding in the name of the United States. The State of Wisconsin contends that it does have such authority. Thus, it is clear that the defense raised by the United States and the main action have a question of law in common and, therefore, intervention should be permitted. See *Securities and Exchange Commisison* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 458-460.

The Federal Home Loan Bank Board requests permission to intervene because the present action involves the interpretation of the Home Owners' Loan Act of 1933, which is administered by the Federal Home Loan Bank Board, and the validity of a regulation promulgated by the Federal

23 Home Loan Bank Board. Rule 24(b)(2), Federal Rules of Civil Procedure, provides that an agency may be

permitted to intervene in an action when a party to the action relies for ground of claim or defense upon any statute or regulation administered or promulgated by the agency. See *All American Airways Inc.* v. *Village of Cedarhurst*, 201 F. 2d 723; *West India Fruit & Steamship Co.* v. *Seatrain Lines Inc.*, 170 F. 2d 775, cert. dismissed on motion of petitioner, 336 U. S. 908.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice, Attorneys for the United States and the Federal Home Loan Bank Board.

26 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

NOTICE OF MOTION AND MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO.

To: Honorable Vernon W. Thomson,
Attorney General for State of Wisconsin,
Madison, Wisconsin;

Messrs. Russell and Bridewell,
Attorneys at Law,
7 South Dearborn Street,
Chicago 3, Illinois;

Mr. Jack Werner,
Attorney at Law,
741 North Milwaukee Street,
Milwaukee 2, Wisconsin.

Please Take Notice: That the attached Motion to Dismiss the Information in the Nature of Quo Warranto and Memorandum of Points and Authorities in Support of Motion to Dismiss the Information in the Nature of Quo Warranto will be brought on for hearing at a time to be designated by the Clerk of Court before the Honorable Robert E. Tehan, United States District Judge, in his Court Room, Federal Building, Milwaukee, Wisconsin.

Dated this 16th day of March, 1956.

Edward G. Minor,
United States Attorney,
Attorney for Plaintiffs.

27 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO.

The United States and the Federal Home Loan Bank Board, intervenors, respectfully move this Court to dismiss the Information in the Nature of Quo Warranto, filed by the Attorney General of the State of Wisconsin, in the name of the United States on the relation of the State of Wisconsin, on the grounds that the Court lacks jurisdiction to grant the relief requested; that the State of Wisconsin has no authority to use the name of the United States in maintaining an action in the nature of quo warranto; and that the information fails to state a claim upon which relief can be granted.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice, Attorneys for the United States, and the Federal Home Loan Bank Board.

28 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE INFORMATION IN THE NATURE OF QUO WARRANTO.

Preliminary Statement.

The Attorney General of the State of Wisconsin has filed, in the name of the United States, an Information in the Nature of Quo Warranto, asking the First Federal Savings and Loan Association of Milwaukee, Wisconsin, to declare by what right it asserts a charter and franchise to establish receiving stations in the State of Wisconsin at a distance from its principal location.

The United States and the Federal Home Loan Bank Board, which have intervened in this action pursuant to leave granted by this Court, have moved to dismiss the Information in the Nature of Quo Warranto.

Statement of Facts.

The Attorney General of the State of Wisconsin has filed, in the name of the United States on the relation of the State of Wisconsin, an information in the nature of quo warranto against a federal savings and loan association in Milwaukee, Wisconsin, which has been chartered by the Federal Home Loan Bank Board under the Home Owners' Loan Act of 1933.

The Federal Home Loan Bank Act (Act of July 22, 1932, 47 Stat. 725, 12 U. S. C. 1421 et seq.) and the Home Owners' Loan Act of 1933 (Act of June 13, 1933, 48 Stat. 128, 12 U. S. C. 1461 et seq.), authorize the Federal Home Loan
29 Bank Board, an unincorporated agency in the executive branch of the Government, to issue charters for the

creation of federal savings and loan associations (see 12 U. S. C. 1437, 1464). These savings and loan associations are "local mutual thrift institutions in which people may invest their funds," and with limited exceptions they may make loans only on first mortgages on "homes or combination of homes and business property within fifty miles of their home office" (12 U. S. C. 1464).

The operation of these savings and loan associations is strictly limited and regulated by these statutes and by rules and regulations which the Bank Board has promulgated pursuant to its statutory authorization (12 U. S. C. 1464; 24 C. F. R., Chap. I(C)). The statute itself contains no provisions as to the manner in which or conditions on which the Bank Board may authorize savings and loan associations to establish agencies; this is left to the Bank Board's rules and regulations. These provide:

> § 145.15. *Agency.* • • • A Federal association may, without approval by the Board, establish or maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions; temporary or incidental agencies may likewise be established for individual transactions or for special, temporary purposes. An original record of all business of a Federal association transacted at any agency thereof shall be kept by such agency and such reports of business so transacted shall be made to a branch office or to the home office of such association as are required for the proper conduct and control of the association's affairs. (24 C. F. R., 1954 Supp. to 1949 Ed., § 145.15.)[1]

The defendant savings and loan association proposes to establish in Milwaukee three such agencies which, as limited

1. This regulation also contains provisions for the establishment by a federal savings and loan association of branch offices, which may perform more comprehensive functions than agencies. These are not, however, relevant to this case.

by the regulation quoted above, may merely service loans and contracts of the association or manage or sell real estate owned by the association.

The Attorney General of Wisconsin considers that the establishment of such agencies (termed "receiving stations" in his petition) is prohibited by Wisconsin Statutes, § 215.02(20), which provides:

> No savings and loan association or building and loan association carrying on business in this State shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state.

The Attorney General of Wisconsin further considers that the regulation of the Home Loan Bank Board authorizing federal associations to establish agencies is unauthorized and invalid and apparently also considers that if the act does authorize this regulation it is an unconstitutional delegation of legislative authority.

The Attorney General of Wisconsin requested the Attorney General of the United States to institute a quo warranto proceeding against the Milwaukee savings and loan association but he declined to do so, on the ground that the authority of the Home Loan Bank Board to authorize federal savings and loan associations to establish branches or agencies has been upheld by the courts.[2]

The information seeks to have the charter of the Milwaukee association forfeited.

---

2. A copy of the letter from Assistant Attorney General Burger to the Attorney General of Wisconsin refusing the latter's request to institute quo warranto proceedings is attached as an appendix to this brief.

Argument.

I.

This Court has no jurisdiction to entertain a quo warranto proceeding.

The federal district courts have, of course, only such jurisdiction as Congress has conferred upon them. As we show below, no statute specifically confers quo warranto jurisdiction on the district courts (except in the District of Columbia). The authorities indicate that the district courts do not have any such jurisdiction. *Morin* v. *City of Stuart*, 111 F. 2d 773, 775 (C. A. 5); *Cleveland Cliffs Iron Co.* v. *Village of Kinney*, 262 Fed. 980, 984 (D. Minn.); *In re Yancey*, 28 Fed. 445, 451 (C. C. W. D. Tenn.); 15 Cyc. Fed. Proc. (3rd ed.) § 85.01; Foster, Federal Practice (6th ed.) § 468a.

31 Wisconsin relies upon two provisions of the Judicial Code: 28 U. S. C. 1651(a) and 28 U. S. C. 1345. We submit that neither section gives jurisdiction over the proceeding.

A. *The "all writs" section of the Judicial Code, 28 U. S. C. 1651(a), does not confer jurisdiction; it is applicable only to confer ancillary jurisdiction where jurisdiction is otherwise granted.* This section by its terms merely grants the federal courts authority to issue writs "in aid of their respective jurisdictions." It does not by itself confer jurisdiction over any type of action. *Covington and Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109; *Knapp* v. *Lake Shore Railway Co.*, 197 U. S. 536; *Marshall* v. *Crotty*, 185 F. 2d 622, 626-7 (C. A. 1); *Petrowski* v. *Nutt*, 161 F. 2d 938 (C. A. 9); *Amchanitzky* v. *Sinnett*, 69 F. 2d 97 (C. A. 2). See also *Rosenbaum* v. *Bauer*, 120 U. S. 450, 453-6; *McIntire* v. *Wood*, 7 Cr. 504; *Bath County* v. *Amy*, 13 Wall. 244.

B. *Jurisdiction over this action is not conferred by 28 U. S. C. 1345.* That section of the code grants district courts jurisdiction of "all civil actions, suits or proceedings commenced by the United States," "Except as otherwise provided by Act of Congress * * *" Whether a district court would have jurisdiction of a quo warranto brought by the Attorney General of the United States on behalf of the United States (See *Territory* v. *Lockwood*, 3 Wall. 236, 240; *Wallace* v. *Anderson*, 5 Wheat. 291) need not be decided here. For the United States, acting through its Attorney General, has refused to bring such an action. Assuming for the moment that the State of Wisconsin is authorized to bring the proceeding in the name of the United States (which we deny; see p. 6 below), the United States is "but a nominal party." *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 157. In essence this is a suit by the State of Wisconsin. 28 U. S. C. 1345 confers jurisdiction of proceedings in which the United States asserts a claim, but not, as here, where a state asserts a claim.

Furthermore, as we show below, 28 U. S. C. 1345 is inapplicable because as to quo warranto proceedings Congress has "otherwise provided."

32 C. *Congress has vested federal quo warranto jurisdiction solely in the district court for the District of Columbia.* The Revised Statutes of 1878 specifically vested both the district courts and the former circuit courts with jurisdiction of proceedings in quo warranto brought by a United States Attorney for the removal of persons holding office contrary to the Fourteenth Amendment (*i.e.*, persons who had engaged in insurrection against the United States). Rev. Stat., §§563(14), 629(14), 1786. Significantly, these grants of jurisdiction were in addition to the separate grants of jurisdiction to these courts of suits at common law and in equity where the United States was plaintiff. Rev. Stat. §§563(4), 629(2)(3).

This limited grant of quo warranto jurisdiction was, however, repealed by the Judicial Code of 1911. 36 Stat. 1087, 1168. And the duty imposed on United States Attorneys to bring quo warranto proceedings of the type authorized by the Revised Statutes was repealed by the 1948 revision of the Judicial Code. Act of June 25, 1948, 62 Stat. 869, 992-3.

In the meantime Congress enacted in 1901 a code of law for the District of Columbia which specifically authorizes the district court for the District of Columbia (formerly called the Supreme Court of the District) to issue quo warranto in the name of the United States on application of the Attorney General. Act of March 3, 1901, 31 Stat. 1189, 1419-20, District of Columbia Code, §16-1601. See *Newman v. United States ex rel. Frizzell*, 238 U. S. 537, for a discussion of this statute.

The repeal of the quo warranto jurisdiction given by the Revised Statutes, together with the grant of such jurisdiction to the district court for the District of Columbia alone, makes it plain that the district courts outside the District of Columbia have no quo warranto jurisdiction.

Since this court has no jurisdiction to entertain the information filed by the Wisconsin Attorney General, this information should be dismissed.

33

II.

The State of Wisconsin has no authority to bring this proceeding in the name of the United States and the proceeding is not truly one brought by the United States.

The United States, acting through its Attorney General, has refused to bring this action. Yet the Attorney General of Wisconsin presumes to use the name of the United States as plaintiff here. What is his authority for doing so? We think he has none.

No Act of Congress authorizes a state to bring quo warranto in the name of the United States. On the contrary, Congress has provided that the interests of the United States, when involved in any law suit, shall be represented by the Attorney General of the United States or other officials of the Department of Justice. 5 U. S. C. 309, 316. See *Booth* v. *Fletcher*, 101 F. 2d 676, 679-82 (C. A. D. C.); *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278-84.

28 U. S. C. 507 makes it the duty of United States Attorneys to prosecute "for the government, all civil actions, suits or proceedings in which the United States is concerned." The Attorney General of Wisconsin has no authority to maintain this proceeding in the name of the United States. See *Confiscation Cases*, 7 Wall. 454, 457; *United States ex rel. West* v. *Doughty*, Fed. Cas. No. 14,986 (S. D. N. Y.); *United States* v. *1,960 Acres of Land*, 54 F. Supp. 867, 872-4, same case, *United States* v. *Hall*, 145 F. 2d 781 (C. A. 9). Apposite here is the opinion of Mr. Justice Johnson in *United States* v. *Morris*, 10 Wheat. 246, 301, in affirming Fed. Cas. No. 15,816 (C. C. D. N. Y.):

> * * * How, in fact, the name of the United States comes at all to be used in this cause, is to me a mystery. * * * That the name of the United States should be used against its will, and an attorney for the United States nominated by a judge, to act where the attorney of the United States refuses to act, and that without any authority by statute, I acknowledge has excited my surprise.

Where Congress desires to permit the name of the United States to be used by some other person or entity in bringing a law suit, it specifically so provides. See, as examples, 40 U. S. C. 270b; 25 U. S. C. 201; 31 U. S. C. 232(B).

34 In the field of quo warranto Congress permits such a proceeding to be brought in the name of the United States by other persons under certain circumstances, but

only if the action is brought in the District of Columbia. See page 5, above.

Furthermore the bringing of this action in the name of the United States violates Rule 17(a), which requires every action to be prosecuted in the name of the real party in interest[3] and provides that an action for the use and benefit of another shall be brought in the name of the United States "where a statute of the United States so provides • • •" No statute provides for bringing a quo warranto action in the name of the United States in this Court.

A second and independent ground for dismissing this information is, therefore, the fact that the State of Wisconsin has no authority to bring this proceeding in the name of the United States.

III.

Even if this Court has jurisdiction of this proceeding it should, as a matter of discretion, dismiss the Information.

As we have shown, we do not think this Court has any quo warranto jurisdiction. But if the Court should disagree with our jurisdictional contentions, we submit that it should, as a matter of discretion, dismiss the information, for two reasons: (1) it is by no means clear that any violation of Wisconsin law is threatened; and (2) in any event Wisconsin has other available remedies to test the issue.

Quo warranto is an extraordinary remedy granted not as a matter of right but only in the sound discretion of

3. Since the basic purpose of the proceeding is to stop an alleged violation of Wisconsin law, Wisconsin is obviously the real party in interest. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 157; *First National Bank* v. *Missouri*, 263 U. S. 640, 660.

the Court. High, Extraordinary Legal Remedies (3rd Ed.), pp. 558-9, 639-41.

A. *It is doubtful that the use of agencies by a federal savings and loan association is even purportedly prohibited by Wisconsin law.* Chapter 215 of the Wisconsin statutes is a comprehensive code governing savings and loan associations. It explicitly distinguishes between (1) associations organized under Wisconsin law; (2) associations organized under laws of other states which do business in Wisconsin; and (3) *federal* savings and loan associations such as the Milwaukee association involved here. See the definitions in §§ 215.01(2)(10)(11), 215.80. The statute provides for supervision of Wisconsin associations and associations of other states doing business in Wisconsin, but recognizes that Wisconsin cannot regulate federal associations. §§ 215.52, 215.67(2), 215.80-215.88.

The Attorney General of Wisconsin assumes without discussion that the section prohibiting any "savings and loan association or building and loan association carrying on business in this state" from operating agencies (§ 215.02(20)) is applicable to federal as well as state associations. With all due respect to the Attorney General of Wisconsin as an authoritative interpreter of Wisconsin statutes, we submit that the statute seems to indicate otherwise. Apparently, there are no judicial constructions of this section.

In the first place, when the Wisconsin statute intends to refer to federal associations it so describes them. See §§ 215.01(10), 215.67. In the second place, the agency prohibition provisions is a part of § 215.02, headed "Incorporation". That section provides for incorporation of a "savings and loan association" by the state commissioner of savings and loan associations upon application by citizens of Wisconsin. That incorporation procedure obviously

has no application to federal associations, which are chartered by the Federal Home Loan Bank Board. So it seems logical to construe § 215.02(20) as intended to apply only to state associations. In the third place, it seems a fair assumption that the Wisconsin legislature enacted this chapter with recognition of the constitutional impediment to state control of a corporation chartered pursuant to an Act of Congress (*Franklin National Bank* v. *New York*, 347 U. S. 373), where, as here, the federal law contains no indication of a Congressional purpose to subject these federal associations to state regulation as to branches or agencies. Compare the difference in Congressional
36 approach in this respect between the Home Owners' Loan Act of 1933 and the National Bank Act, as recognized in *Springfield Institution for Sav.* v. *Worcester Federal Savings & Loan Ass'n*, 107 N. E. 2nd 315, 318 (Mass.); *People of State of California* v. *Coast Federal Savings & Loan Ass'n.*, 98 F. Supp. 311, 319 (S. D. Cal.); *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Ass'n.*, 187 F. 2d 564, 567 (C. A. 3). See also *First Federal Savings & Loan Ass'n. of Wisconsin* v. *Loomis, Atty. Gen. of Wisconsin*, 97 F. 2d 831 (C. A. 7), affirming that a federal savings and loan association "is under the sole authority and control of the laws of the United States".

Accordingly, the fact that the Wisconsin statute is apparently not intended to apply to federal associations in this respect should dispose the Court to exercise its discretion and dismiss the information.

B. *The information should be dismissed because Wisconsin has other available remedies to test the issue involved.* Quo warranto, as a discretionary writ, will not be granted where the complaining party has other available remedies, either in law or equity. High, Extraordinary Legal Remedies (3rd Ed.), pp. 572, 607.

The Attorney General of Wisconsin asserts that the es-

tablishment of agencies by the Milwaukee Association is (1) unauthorized by the federal statute pursuant to which the association is organized; and (2) is a violation of the state prohibition against agencies. As to the association's alleged lack of authority under federal law, that is obviously a matter of no concern to Wisconsin. If an authority granted by Congress is being abused, the federal government, not the State, is the one to take corrective measures. The State may not bring quo warranto to assert this federal interest. *First National Bank* v. *State of Missouri,* 263 U. S. 640, 660; *Territory* v. *Lockwood,* 3 Wall. 236; *Wallace* v. *Anderson,* 5 Wheat. 291; *Newman* v. *United States ex rel. Frizzell,* 238 U. S. 537; *Johnson* v. *Manhattan Railway Co.,* 289 U. S. 479, 502.

37 *First National Bank* v. *State of Missouri,* 263 U. S. 640, 660, would seem to establish that the State of Wisconsin has a justiciable interest in the question as to whether the Milwaukee association here involved is acting in violation of state law. But as that case shows, the appropriate remedy for the state is to bring quo warranto proceedings in the *state* courts. *State ex rel. Cleary* v. *Hopkins Street Building & Loan Ass'n.,* 217 Wis. 179, 257 N. W. 684, affirmed, *Hopkins Federal Savings & Loan Ass'n.* v. *Cleary,* 296 U. S. 315, and *First Federal Savings & Loan Ass'n. of Wisconsin* v. *Loomis, Atty. Gen. of Wisconsin,* 97 F. 2d 831 (C. A. 7), establish that a quo warranto proceeding may be brought in the Wisconsin courts.

Furthermore, in view of the broad authority of the Attorney General of Wisconsin to prosecute actions in which the state has an interest (Wis. Stat. § 14.53) it would seem that he could maintain in the appropriate court a suit to enjoin the alleged violation of state law by the Milwaukee association. See *In re Debs,* 158 U. S. 564, 584; *United States* v. *American Bell Telephone Co.,* 128 U. S. 315; *United States* v. *City of San Francisco,* 310 U. S. 16, 31;

United States v. *United Mine Workers of America*, 330 U. S. 258.[4]

Since other remedies are available to the state, the information should be dismissed.

IV.

The regulation of the Federal Home Loan Bank Board authorizing federal savings and loan associations to establish agencies is valid.

For the reasons stated above we do not believe the Court is called upon to reach the merits of the case presented by the State of Wisconsin. If the Court does, however, reach the issue as to whether the challenged regulation of the Federal Home Loan Bank Board is valid, that will furnish an additional reason for dismissing the information. For it is plain that Wisconsin's attack on the federal regulation is completely lacking in merit.

38 The authority of the Federal Home Loan Bank Board to provide by regulation for the establishment of branches or agencies has been upheld in three cases: *First National Bank of McKeesport, et al.* v. *First Federal Savings and Loan Association of Homestead*, 225 F. 2d 33 (C. A. D. C.); *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Ass'n.*, 187 F. 2d 564 (C. A. 3), cert. den. 342 U. S. 816;[5] and *Springfield Institution for Sav.* v. *Worcester Federal Savings & Loan Ass'n.*, 107 N. E. 2d 315

4. If the Attorney General of Wisconsin were correct in his view that the regulatory provisions of Chapter 215 of the Wisconsin Statutes are validly applicable to federal savings and loan associations, that chapter would provide an additional remedy of having the savings and loan commissioner take possession of the association. See § 215.70.

5. The brief of Wisconsin cites this case in the district court (92 F. Supp. 481) without indicating that it was also decided by the Court of Appeals.

(Mass.), cert. den. 344 U. S. 884. Those three cases specifically involved the Bank Board's authority to provide for branches of federal savings and loan associations rather than agencies; but since branches perform more comprehensive functions than agencies (see footnote 1, p. 2 above), those decisions *a fortiori* sustain the validity of the agency aspect of the regulation. Since those three decisions contain such a comprehensive discussion of the whole issue, we do not feel that any further discussion in this brief is necessary. There are no judicial decisions contrary to these three cases.[6]

In his brief (pp. 8-9) the Attorney General of Wisconsin asserts that the State of Wisconsin has made its policy decision that it is not desirable to permit savings and loan associations to have branches or agencies. Wisconsin is, of course, free to adopt such policy as it chooses with respect to state savings and loan associations. As to federal associations, however, Congress has specifically delegated the function of making that policy decision to the Federal Home Loan Bank Board, not to the states (12 U. S. C. 1464 (a)). As stated in the *North Arlington* case:

39 Here is an area where the Board is given the duty and authority to make policy. It is supposed to find out what the practices of these institutions are and give primary consideration to the best ones.

What is the practice with regard to branch offices? According to a committee report on a bill to amend the present act, only six states have statutes which prohibit the establishment of branch offices by building and loan associations. Thirteen states specifically au-

6. The Attorney General of Wisconsin complains that the Supreme Court of the United States has never ruled upon this issue. It denied certiorari in both the *North Arlington* and *Springfield* cases, presumably because it felt that the challenges to the validity of the Bank Board's regulation were so lacking in merit as to be unworthy of consideration by the Supreme Court.

> thorize them and twenty-nine have not legislated upon the subject. Congress put the duty upon the Board to decide what was the best practice and to give consideration to it. The Board did so by authorizing branches under conditions set out in its Regulations. This, it seems to us, is a very strong argument for concluding that the authority to establish branch offices is vested in the Board, and by the very terms of the Congressional enactment. (187 F. 2d at 565-6.)

The *Springfield* case points out that Congress intended that the Bank Board regulations with respect to branches and agencies should "be of uniform application throughout the country," rather than vary from state to state. (107 N. E. 2d at 318.) See also *Franklin National Bank of Franklin Square* v. *New York*, 347 U. S. 373.

The Attorney General of Wisconsin seems to urge that because Congress, when it enacted the National Bank Act, adopted a policy of having national banks conform to state law as to branches, it did the same thing when it enacted the Home Owners' Loan Act of 1933. The fact is that Congress did not adopt a conformity-to-state-law policy in the Home Owners' Loan Act of 1933, as is explicitly recognized in the *Springfield* and *North Arlington* cases and in *People of State of California* v. *Coast Federal Sav. & Loan Ass'n*, 98 F. Supp. 311, 318-9 (S. D. Cal.). In *First Federal Savings & Loan Assn. of Wisconsin* v. *Loomis, Atty. Gen. of Wisconsin*, 97 F. 2d 831, which rejected Wisconsin's challenge to the right of federal savings and loan associations to do business in Wisconsin without state authorization, the Court of Appeals for this circuit affirmed a holding that a federal savings and loan association "is under the sole authority and control of the laws of the United States."

The Attorney General of Wisconsin makes the further contention that if, as the above cited cases hold, Congress has delegated to the Bank Board the authority to lay

down the policy as to permitted branches and agencies
40 of federal savings and loan associations, the Bank Board, by permitting federal associations to establish agencies of limited powers without specific approval by the Bank Board, has invalidly subdelegated its function. Although the argument is not clear to us, the Attorney General of Wisconsin seems to contend that any such "subdelegation" would constitute an unconstitutional delegation of legislative authority.[7]

Actually to permit federal associations to establish such agencies as they please without approval of each particular agency by the Bank Board is not a real delegation of legislative authority at all. The decision whether a particular association should be permitted to have an agency is not an appropriate matter for legislation, it would be absurd to expect Congress to pass a special law everytime a federal association wished to open an agency office. The Wisconsin business corporation law permits a business corporation to establish offices when and where it pleases throughout the world, without requiring administrative permission. Wisconsin Statute § 181.04(9). Does the Attorney General of Wisconsin consider that an unconstitutional delegation of legislative authority?

In the Home Owners' Loan Act of 1933 Congress vested in the Federal Home Loan Bank Board the function of regulating federal savings and loan associations, "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." 12 U. S. C. 1464(a). That was a valid delegation of authority to the Bank Board, which the Board has exercised by concluding that the "best practices" permit federal associations to decide for themselves when and

[7] In the light of 28 U. S. C. 2282 there would seem to be some doubt as to whether that issue may be considered by a single district judge.

where to open agencies. *Fahey* v. *Mallonee*, 332 U. S. 245, 249-50, and the *North Arlington* and *Springfield* cases, *supra*, sustain the constitutionality of that delegation. The *Fahey* case distinguishes *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter Corp.* v. *United States*, 295 U. S. 495, relied on by Wisconsin.

41 Accordingly, this information should be dismissed on the ground that Wisconsin has no case on the merits, if the Court ever reaches that issue.

Conclusion.

For the reasons stated above, the Court should dismiss the information in the nature of quo warranto filed by the Attorney General of Wisconsin.

Respectfully submitted,

Warren E. Burger,
Assistant Attorney General.

Edward G. Minor,
United States Attorney.

Edward H. Hickey,
Donald B. MacGuineas,
F. Carolyn Graglia,
Attorneys, Department of Justice,
Attorneys for the United States,
and the Federal Home Loan
Bank Board.

42 WEB:DBH:mm
29-85-180

Honorable Vernon W. Thomson,
Attorney General,
State of Wisconsin,
Madison, Wisconsin.

Dear Mr. Thomson:

Your letter of October 29 to the Attorney General with respect to the establishing of agencies by federal savings and loan associations has been referred to me for reply.

I understand that you have communicated with the Home Loan Bank Board about this matter and have received its views.

As you state in your letter, the regulations of the Home Loan Bank Board provide that a federal savings and loan association may, without specific approval by the Board, establish agencies which are limited to the functions of servicing of loans and contracts and the management or sale of real estate owned by the association. By those regulations federal savings and loan associations may not establish branch offices or agencies which perform broader functions without express approval by the Home Loan Bank Board (24 C. F. R. (1954 Supp.), § 145.15).

You point out that the establishing of such agencies is contrary to the policy of the State of Wisconsin in that State banks and savings and loan associations are not permitted to establish branches or agencies of any kind.

As you may know, the authority of the Home Loan Bank Board to authorize federal savings and loan associations to establish branch offices has been the subject of judicial decision. In *Springfield Institution v. Worcester Federal Savings & Loan Assn.*, 329 Mass. 184, 107 N. E. 2d 315, cert. denied 344 U. S. 884, the Supreme Judicial Court of Massachusetts held that under the Home Owners' Loan Act of 1933 the Home Loan Bank Board may authorize branch offices of federal associations even where the establishment of such branches is contrary to State law. The Bank Board's authority to authorize such branches was

also upheld in *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Assn.*, 187 F. 2d 564 (C. A. 3). In two recent unreported cases the District Court for the
43 District of Columbia has again sustained this authority of the Bank Board. There are no judicial decisions to the contrary.

Your letter points out that in the National Bank Act (17 U. S. C. 36) Congress has adopted the policy of limiting branches of national banks to the extent that State banks are permitted to establish branches. In the *North Arlington* case, however, the court pointed out that Congress in enacting the Home Owners' Loan Act of 1933 did not choose to adopt this same policy.

In the light of these decisions I am sure you will appreciate why the Attorney General considers that it would be inappropriate for him to institute a quo warranto action to challenge the establishment of agencies by the federal savings and loan association in Milwaukee, even assuming that quo warranto would be the appropriate type of proceeding in such a situation. Accordingly, I regret that we cannot comply with your request to have such an action instituted in the name of the Attorney General.

Sincerely yours,

Warren B. Burger,
Assistant Attorney General.

49 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—6475) * *

NOTICE OF MOTION FOR SUMMARY JUDGMENT.

(Filed Mar. 26, 1956. Dale E. Ihlenfeldt, Clerk.)

To: Russell and Bridewell,
Attorneys,
7 South Dearborn Street,
Chicago, Illinois.

Jack Werner,
Attorney,
741 No. Milwaukee Street,
Milwaukee, Wisconsin.

Edward G. Minor, U. S. Attorney,
Federal Building,
Milwaukee, Wisconsin.

Please take notice that the undersigned will move this court at the court room in the Federal Building in the city of Milwaukee, Wisconsin, on the 29th day of March, 1956, at 2:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for entry of summary judgment herein in favor of the plaintiff against the defendant for the relief prayed for in the complaint, together with costs and disbursements, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and upon the pleadings, proceedings, and depositions heretofore had herein.

Dated this 23rd day of March, 1956.

Vernon W. Thomson,
Attorney General of Wisconsin,

Stewart G. Honeck,
Deputy Attorney General,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,

Stewart G. Honeck,
Attorneys for Plaintiff.

P. O. Address:
Room 114 East,
State Capitol,
Madison 2, Wisconsin.

50 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

MOTION BY PLAINTIFF FOR SUMMARY JUDGMENT.

Plaintiff moves the court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the plaintiff for the relief demanded in his complaint, on the ground that there is no genuine issue as to any material fact in this action and that plaintiff is entitled to a judgment as a matter of law, as appears from the pleadings, proceedings and depositions on file in this action.

Dated this 23rd day of March, 1956.

Vernon W. Thomson,
Attorney General of Wisconsin.

Stewart G. Honeck,
Deputy Attorney General,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,
Attorneys for Plaintiff.

P. O. Address:
Room 114 East,
State Capitol,
Madison 2, Wisconsin.

51 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

STIPULATION.

(Filed Mar. 29, 1956. Dale E. Ihlenfeldt, Clerk.)

The parties to this case stipulate as follows:

1. The State of Wisconsin is one of the 48 sovereign states of the United States of America, and is the owner of almost $30,000,000 in loans upon homes of veterans in the State of Wisconsin; that most of said loans are secured by second mortgages which are junior to first mortgages held by chartered savings and loan institutions and other supervised agencies; that the security of said second mortgages is dependent upon the maintenance of a sound system of financial institutions in the State of Wisconsin.

2. In Wisconsin and many other areas of the United States, branch banks and branch agencies of state savings and loan associations are prohibited by law or state practice, and in some cases prohibited unless approved by properly authorized governmental agencies, and the National Bank Act limits branches of national banks [as] stated in paragraph 4 of the Information.

3. The rules and regulations for federal savings and loan associations as to home office, branch offices, agencies and change of office location prescribed by the Federal
52 Home Loan Bank Board, are set forth in sections 145.13, 145.14, 145.15 and 145.16 of the Official Rules and Regulations for the Federal Savings and Loan system.

4. The position of Wisconsin on this subject is as stated in section 215.02 (2) of the Statutes of the State of Wisconsin.

5. The depositions of John O'Neill and Sylvia Dockery may be made a part of the record in this case the same as though their testimony were given in open court and those depositions accurately describe the operations carried on at the agencies of the defendant.

6. The Attorney General of Wisconsin requested, and the Attorney General of the United States declined to institute a proceeding in the nature of quo warranto as alleged in paragraph 10 of the Information.

Dated this 29th day of March, A. D. 1956.

Vernon W. Thomson,
Attorney General of Wisconsin,
Jack C. Werner,
Horace Russell,
Attorneys for Defendant,
Donald B. MacGuineas,
Attorney, Dept. of Justice.

53 UNITED STATES DISTRICT COURT.

* * (Caption—6475) * *

ORDER.

(Filed Mar. 29, 1956. Dale E. Ihlenfeldt, Clerk.)

This cause came on to be heard on March 29, 1956, on the motion of the United States of America and the Federal Home Loan Bank Board for leave to intervene; and it appearing that the State of Wisconsin, and defendant, First Federal Savings and Loan Association, have no objection to a motion to intervene on the part of the Federal Home Loan Bank Board;

It Is Hereby Ordered: That the Federal Home Loan Bank Board is hereby given leave to intervene as a party defendant.

It Is Further Ordered: That the motion for intervention by the United States is taken under submission by the Court.

Dated at Milwaukee, Wisconsin, this 29th day of March, 1956.

Robert E. Tehan,
United States District Judge.

54 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

ORDER.

(Filed Mar. 18, 1957. Dale E. Ihlenfeldt, Clerk.)

The above entitled action having come on for hearing before the Court, and the Court having heard the arguments of counsel, and having read the briefs submitted and being fully advised in the premises, and having this day filed its Opinion,

Now, Therefore, It Is Ordered: The motion of the defendant, First Federal Savings & Loan Association, and the intervening defendant, Federal Home Loan Bank Board, for judgment of dismissal of the action as to each of them, is hereby granted.

The motion of the plaintiff's relator, State of Wisconsin, for summary judgment, is hereby denied.

Dated, Milwaukee, Wisconsin, this 18th day of March, 1957.

Robert E. Tehan,
U. S. District Judge.

55 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

OPINION.

(Filed Mar. 18, 1957. Dale E. Ihlenfeldt, Clerk.)

The Attorney General of the State of Wisconsin has filed in the name of the United States, on the relation of the State of Wisconsin, a petition for leave to file an information in the nature of quo warranto against the defendant First Federal Savings and Loan Association in Milwaukee,

Wisconsin, requiring said defendant (hereinafter referred to as the Association) to declare by what right it asserts a charter and franchise to establish receiving stations in the County of Milwaukee at a distance from its principal location and in default thereof asking that a judgment of ouster issue vacating and forfeiting the charter asserted by the Association.

Following a hearing at which oral arguments of counsel were heard and written briefs submitted by the parties, this court, being of the opinion that the relator (hereinafter referred to as the State of Wisconsin) had made a showing that a substantial issue existed, ordered that it be granted leave to file its information in the nature of quo warranto.

Thereafter, this court granted the motion of the Fed-
56 eral Home Loan Bank Board (hereinafter referred to as the Board) to intervene as a party defendant.

The pleadings and a stipulation establish substantially the following fact situation:

The State of Wisconsin, one of the forty-eight states of the United States of America, is the owner of almost $30,000,000 in loans upon homes of veterans in the State of Wisconsin. Most of these loans are secured by second mortgages which are junior to first mortgages held by chartered savings and loan institutions and other supervised agencies. The security of said second mortgages is dependent upon the maintenance of a sound system of financial institutions in the State of Wisconsin.

In Wisconsin and many other areas of the United States, branch banks and branch agencies of state savings and loan associations are prohibited by law or state practices and in some cases prohibited unless approved by properly authorized governmental agencies. The soundness of conforming federal law to local practices has been recognized by the Congress itself in regard to national banks by the

provisions of the McFadden Act, which reads in part, Title 12 U.S.C.A. Section 36 (c):

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; [here follow similar provisions]."

In the State of Wisconsin, the prohibition against the operation or maintenance of branch offices or agencies is asserted in Section 215.02 (20) Wisconsin Statutes:

57 "(20) ONE OFFICE ONLY. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

The defendant Association was chartered by the United States of America on February 20, 1934 under the provisions of Section 5 of the Home Owners' Loan Act of 1933 as amended, 12 U.S.C.A. Section 1464, and the Rules and Regulations for Federal Savings and Loan Associations adopted by the Board.

By the provisions of the organic act, Section 5 of the Home Owners' Loan Act of 1933 as amended, the Board is required by the Congress of the United States, in the issuance of charters, to give primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States, to refuse to grant a charter without a judgment of the Board itself that a necessity exists for an association in the particular community to be served, and a finding that such association can be established without undue injury to properly conducted existing local thrift and home-financing institutions. 12 U.S.C.A. Sections 1464 (a), (c).

The specific provisions of the Board's Rules and Regulations relating to the establishment and operations of agencies is Regulation No. 145.15 which reads in material part:

> "Sec. 145.15 *Agency.* * * * A Federal association may, without approval by the Board, establish or maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions; temporary or incidental agencies may likewise be established for individual transactions
> 58 or for special, temporary purposes. An original record of all business of a Federal association transacted at any agency thereof shall be kept by such agency and such reports of business so transacted shall be made to a branch office or to the home office of such association as are required for the proper conduct and control of the association's affairs." (24 C.F.R. 1954 Supp. to 1949 Ed. Sec. 145.15.)

The defendant Association in apparent reliance on Regulation 145.15 and admittedly with the exercise of no judgment but its own, established and is operating three agencies in the County of Milwaukee, separate and at a distance from its main office.

It appears from the testimony contained in the depositions taken of two of the Association's employees, which testimony has been stipulated to as accurately describing the agencies' operations, that these agencies collected payments on mortgages, kept loan files and payment records, serviced loans, channeled insurance claims, transferred delinquent accounts to the main office, prepared daily trial balances and monthly reports, and answered purchasers' questions. Loans themselves were not negotiated at these agencies. Loan and savings account applications were referred to the main office and never taken by the agencies. Deposit payments on savings share accounts were received at the main office, not at the agencies.

Prior to the commencement of this action, the Attorney General of Wisconsin made a formal demand upon the Attorney General of the United States that he file an information in the nature of quo warranto against the defendant Association for the purpose of securing a judgment of ouster based on the usurpations described in the information. The Attorney General of the United States, however, formally declined to file such in information.

59 Upon the pleadings, proceedings, depositions and the stipulation in this action, the State of Wisconsin moved the court pursuant to Rule 56, Federal Rules of Civil Procedure, to enter judgment for it for the relief demanded in the information on the grounds that there is no issue as to any material fact in the action and the State of Wisconsin is entitled to judgment as a matter of law.

Prior to this motion, the defendant Association had moved for dismissal of the information on the grounds that this court had no jurisdiction, that the information stated no cause of action, and that the State of Wisconsin could have no standing in this court until administrative remedies had been exhausted. The intervening Board likewise moved for dismissal of the information on the grounds that the court lacks jurisdiction to grant the relief requested; that the State of Wisconsin has no authority to use the name of the United States in maintaining an action in the nature of quo warranto; and that the information fails to state a claim upon which relief can be granted.

Since certain of the motions for dismissal interposed by the defendants involve a consideration of matters beyond the pleadings filed in the case, these motions will be treated as motions for summary judgment under Rule 56, Federal Rules of Civil Procedure.

Before proceeding to a consideration of the questions of

law raised by these cross-motions for summary judgment, it should be pointed out that no party in resisting such motion of an adversary party contends that the motion should be denied by reason of the existence of a genuine issue of material fact.

60 At an earlier stage in this proceeding the State of Wisconsin apparently was not prepared to concede that the agencies involved in this action were operating as agencies "limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions" as described in Section 145.15 of the Board's Regulations. (24 C. F. R. 1954 Supp. to 1949 Ed. Section 145.15)

Accordingly, it caused depositions to be taken of two of the Association employees in respect of the operations and functions carried on in these agencies. While the State of Wisconsin has still not expressly conceded the fact, its failure to contend that the testimony given or that other evidence shown to be in existence and which could be adduced at a trial would prove otherwise, requires that it be held as established and beyond a question of fact that the services performed at these agencies are within the limitations of Section 145.15 of the Board's Regulations.

The assertion of the right of the State of Wisconsin or any person to bring an action in the nature of quo warranto without the consent of the Attorney General of the United States, raises a substantial question. This court is inclined, however, to the opinion that if the defendant Association in asserting the right to maintain agencies is asserting and usurping a prerogative and franchise not conferred upon it by its charter and is invading the sovereign prerogatives of the United States by whom the charter was granted, the sovereign State of Wisconsin has standing to employ the extraordinary writ of quo warranto to test the legality of the Association so to act. We are of

the further mind that the State of Wisconsin is not required to seek its remedy by use of the administrative procedure under the Act nor is it required to use less extraordinary remedies before resorting to quo warranto. We assume these procedural points, however, and do not decide them, since our decision does not turn upon them.

61 The validity or want of validity in the contentions of the respective parties on the merits of these proceedings can, we believe, be best evaluated against a background of the decisional law on the organic act and the rules and regulations established thereunder.

The Home Owners' Loan Act of 1933 authorizes the Federal Home Loan Bank Board, an unincorporated agency in the executive branch of the United States Government, to issue charters for the creation of Federal savings and loan associations. The standards for the issuance of charters to such associations are set forth in the following sections of the organic act:

Section 1464.

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Association,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

"(c) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions."

The defendant association was chartered on February 20, 1934, under the provisions of the above sections and the rules and regulations for Federal savings and loan associations adopted by the Board.

62 The power of the Board so to issue such charters has been upheld as constitutional. *Fahey* v. *Mallonee*, 322 U. S. 245 (1947); *First Federal Savings & Loan Ass'n.* v. *Loomis*, (C. A. 7, 1938) 97 F. 2d 831.

The State of Wisconsin is not here challenging the right of the Board to have issued that charter and the right of the defendant Association to operate under it at least so far as its main office functions are concerned.

Under the organic act, the Board was given certain rule-making power with respect to Federal savings and loan associations. 12 U. S. C. Section 1464 (d). The resulting rules and regulations make provision among other things for the establishment and maintenance of both branches and agencies. Section 145.14 and Section 145.15 of the Federal Savings & Loan System [Revised].

Because the ultimate questions we here deal with involve the validity of those provisions that provide for the creation of branches and agencies, it would appear to be in order that we treat at some length the decision of the United States Court of Appeals for the Third Circuit, which in the case of *North Arlington Nat. Bank* v. *Kearny Federal Savings & Loan Ass'n.* (C. A. 3, 1951) 187 F. 2d 564, cert. denied 342 U. S. 816 (1951), sustained the power of the Board to establish branches. In that case, the plaintiff was a national bank doing a general banking business in North Arlington, New Jersey. The defendant, whose home office was in Kearny, New Jersey, a town adjoining North Arlington, had established and was operating a branch office in North Arlington. The branch office was about a half mile from the home office of the defendant,

63 and was established with the approval of the Federal

Home Loan Bank Board. The plaintiff national bank complained of this operation, and asked that it be declared illegal. The plaintiff there placed much reliance on the fact that the statute does not give explicit authority to the Board to permit associations to establish and maintain branch offices. Upon an appeal from judgment of dismissal by the District Court, the Court of Appeals passed over the procedural points and addressed itself to the merits of the case.

In concluding that the authority to establish branch offices is vested in the Board by the very terms of the congressional enactment, the Court of Appeals used the following language (Page 565):

> "The basic statute is the Home Owners' Loan Act of 1933, 12 U. S. C. A. Sections 1461-1468. Provision for Federal savings and loan associations begins with Section 1464. The statute is one of the type which states a policy, provides for the project under consideration, lays down some general rules and prohibitions and leaves details to the Board which is authorized by Section 1463. The statutory delegation of authority to the Board has been held constitutional."

Because explicit authority to the Board to permit branch offices cannot be found in the statute, the court dealt with the words and phrases in the statute on which each side respectively relied to show that such authority was intended, or contra, not intended to be given. Upon analysis, the court "granted that a microscopic examination of the statutory words alone does not bring one to any conclusion not open to reasonable differences of opinion." The court, however, found "strong argument for the existence of the power on the part of the Board" from other words of the statute (Page 565):

> "Strong argument for the existence of the power on the part of the Board to establish a branch office for an association we think comes from other words of

the statute. The Board is authorized in Section 1464 (a) to issue charters for Federal savings and loan associations 'giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.' Here is an area where the Board is given the duty and authority to make policy. It is supposed to find out what the practices of these institutions are and give primary consideration to the best ones.

What is the practice with regard to branch offices? According to a committee report on a bill to amend the present act, only six states have statutes which prohibit the establishment of branch offices by building and loan associations. Thirteen states specifically authorize them and twenty-nine have not legislated upon the subject. Congress put the duty upon the Board to decide what was the best practice and to give consideration to it. The Board did so by authorizing branches under conditions set out in its Regulations. This, it seems to us, is a very strong argument for concluding that the authority to establish branch offices is vested in the Board, and by the very terms of the Congressional enactment."

In further support of its holding that the Board has power to create branches, the court relied upon the principle that a contemporaneous interpretation by the authorized administrative agency is of weight in determining what the powers are. In dealing with this point, the court referred to the fact that the provision for the granting of permission for the operation of branch offices has been included in the Rules and Regulations since 1934, and that as of August 19, 1959, there were 1498 Federal savings and loan associations, 69 of which were then operating 72 branches in 22 states and the District of Columbia. The court further emphasized that the weight to be given to this agency's interpretation of authority is emphasized by the subsequent legislative history, all of which implied assent to the existence of the power.

53 In addition, the Court of Appeals in the *North Arlington* case was pressed with the decisions under the National Banking Act to the effect that national banks could not under the original law have branches, and that the privilege given to them to establish branches has been very strictly limited. The court after pointing out the substantial difference between the purpose and function of national banks and savings and loan associations rejected the analogy drawn to the limitations of the powers of the national banks as not very helpful.

In the following year of 1952, the power of the Board to provide for the creation of branches of an association was upheld in *Springfield Institution v. Worcester Federal Savings & Loan Ass'n.*, 329 Mass. 184, 107 N. E. 2d 315 (1952) cert. denied 344 U. S. 884 (1952), and again in 1955 in *First National Bank of McKeesport v. First Federal Savings & Loan Ass'n. of Homestead*, 225 F. 2d 33 (C. A. D. C. 1955). These three cases constitute the decisional law on this point. All three are appellate court decisions in two of which certiorari was sought and denied.

In this setting of the case law, the position of the defendants on the merits can be simply put: (1) The power of the Board as expressed in Section 145.14 to provide for the establishment and maintenance of branches has been sustained in every appellate test; (2) The allowable operations and functions of an agency[1] set up under Section

1 The word "agency" for the purposes of this opinion shall be understood to mean those types of operation referred to in the latter part of Section 145.15 "which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions." It is necessary to make this distinction since there appears to be a less limited type of agency referred to in the fore-part of Section 145.15, for which it is needful to obtain the Board's prior approval.

145.15 are substantially less than those exercisable by
66 a branch; (3) A fortiori, the power of the Board to provide by Section 145.15 for the establishment and maintenance of agencies must be upheld.

The State of Wisconsin, on the other hand, appears to have substantially shifted its position in the latter stages of the case from the approach originally reflected in its first brief. In the last proceeding in this case before the court, in the rebuttal argument on the oral hearing on the motions, the State of Wisconsin, through one of its Assistant Attorneys General, conceded that the State was "trying to overrule" the *North Arlington*, *Springfield* and *McKeesport* cases.[2] This position is in sharp contrast to the approach taken in the first brief, namely, that previous cases involving the power of the Home Loan Bank Board to approve branch offices upon specific application have no relation to the instant case.[3]

67 Although these inconsistent approaches to the applicability of the decisional law in this case are not brought in the alternative, we do not think the State of

2. "We do concede we are trying to overrule the 3 cases that counsel have referred to and cited in their briefs. We don't think the arguments we have made have been considered and we are addressing them to this court and in the only proceeding that we think we can stay in court on." (Oral statement made on rebuttal on oral argument by Roy G. Tulane, Assistant Attorney General of the State of Wisconsin.)

3. "Moreover, we point out that previous cases involving the power of the Home Loan Bank Board to approve branch offices upon specific application have no relation to the present case. In regard to the receiving agencies which are now challenged, the Home Loan Bank Board by its regulations attempted to sub-delegate its claimed power to authorize such agencies to the federally chartered association itself, and to allow the association to determine whether or not it wanted such agencies, and how many of such agencies it wanted."
(Brief of Relator filed December 13, 1954, Page 11.)

Wisconsin can be heard to complain if we so treat them. As we understand it, the position of the State of Wisconsin then is: (1) The *North Arlington*, *Springfield* and *McKeesport* cases were not correctly decided and should not be followed by this court; (2) That in the event this court refuses to depart from these precedents for the Board to establish branches under the procedures set forth in Section 145.14, nevertheless this court must find that these precedents are inapplicable and distinguishable in determining under Section 145.15 whether this Board has the power to "sub-delegate" to officers of various associations the discretion as to whether or not such associations will establish agencies.

In attacking the correctness of the legal conclusions reached in the *North Arlington*, *Springfield* and *McKeesport* cases, the State of Wisconsin has suggested that it is here advancing arguments not considered by those courts.[4] We must confess to a sense of mystification at this claim. A careful reading and re-reading of the briefs filed by the State of Wisconsin and the report of the oral argument have failed to disclose therein any contention or fact that was not advanced and considered in those cases.

The only two grounds that we have discovered as a reason for disapproval of the above holdings are: (1) There is no explicit language in the statutes giving the Board
68 power to establish branches and agencies; and (2) The policy reflected in the National Banking Act requiring conformity to state and local policy on the matter of branches and agencies is applicable to the Home Owners' Loan Act and institutions chartered thereunder.

In respect to the State's first subpoint, no extended treatment seems necessary. The defendants at no time have ever claimed that there is explicit language in the statute giving the Board power to establish branches and agencies.

4. See Footnote 2.

What the defendants do claim and rely on is the construction and holding of the *North Arlington* case "that the authority to establish branch offices is vested in the Board, and by the very terms of the Congressional enactment."

The plaintiff has failed to point out any reason or fact why this is not a correct construction of the statute. Perforce we hold to the interpretation made by that appellate court.

Despite the fact that the State of Wisconsin has obviously devoted a great deal more of its efforts to the argument that the policy and decisional law attending the National Banking Act is here applicable, we find nothing that is new and was not considered and disposed of in the *North Arlington* case in the following language: (Page 567)

> "Finally, there is a consideration of a point on principle which may not be amiss in this highly technical business of statutory interpretation. We were pressed with the decisions under the National Banking Act to the effect that national banks could not under the original law have branches and that the privilege given to them to establish branches has been very
69 strictly limited. All that is tied up with the historical reasons back of the establishment of national banks and the altogether different type of administrative control exerted over them. We do not think that the analogy drawn to the limitations of the powers of the national banks is very helpful in our questions here.
>
> "These savings and loan associations do some of the same things which banks do, obviously. But they do not do a general banking business. They are set up under the declared Congressional purpose to provide thrift institutions in which people may invest their funds and to provide for the financing of homes. There is no danger of any single association becoming a giant monopoly. Its investment area is limited. The associations themselves can only be set up when in the judgment of the Board, those applying for the

charter are persons of good character and responsibility and there is a need for the institution in the community and a probability of its success. The Board is likewise limited in the granting of the charter to situations where the new association can be established without undue injury to properly conducted local thrift institutions already there. Business with this type of institution is done, so far as payments to it are concerned, in small amounts and at frequent intervals. A man gets one loan on his home. That has to be passed upon by the directors at a meeting in the main office no doubt. But the payments on his loan or his subscription to shares will be a matter where convenience in the location of the association's office is of some concern to the customer. It may well be that it is good practice, instead of chartering a large number of associations too small to carry on successfully, to let an established concern do business through branches for the convenience of its customers. If, under all the restrictions placed upon the Board by the statute, it seems to those charged with the decision that a branch office of an established association should be permitted, we think it would be unfortunate to construe the statute to prevent that exercise of business judgment. Such a construction would tend to defeat the policy declared in the legislation."

Since the National Banking Act is wedded to the policy of conformity to state usages and laws, what the State Judicial Court of the State of Massachusetts stated in the case of *Springfield Institution for Sav. v. Worcester Federal Savings & Loan Ass'n., et al*, 107 N. E. 2d 315, (1952) is significant: (Page 318)

"We see no reason to suppose that Congress intended that the board should make regulations which should not be of uniform application throughout the country. See *Hopkins Federal Savings & Loan Association v. Cleary*, 296 U. S. 315, 333, 56 S. Ct. 235, 80 L. Ed. 251.

It does not ensue because formerly under the national bank law the power to establish branches was

withheld, *First National Bank in St. Louis v. State of Missouri, et inf. of Barrett*, 263 U. S. 640, 44 S. Ct. 213, 68 L. Ed. 486, that Congress did likewise in the home owners' loan act. *California v. Coast Federal Savings & Loan Association*, D. C., 98 F. Supp. 311, 319. See *Eddy v. Home Federal Savings & Loan Association*, 60 Cal. App. 2d 42, 44-45, 140 P. 2d 156.[4]

The foregoing authority is more than sufficient to reject the contention of the State of Wisconsin in this respect. Nevertheless it should be observed that efforts apparently substantial and determined have been made in the Congress of the United States to impress upon the Home Owners Loan Act the policy of the Mc Fadden Banking Act of conformity to the state law and practice with respect to financial institutions.

If the Board's policy with respect to branches and agencies was not agreeable to the intent of Congress it had the opportunity to change it in 1949, 1954 and 1955.[5]

4. In 1949, as indicated in the North Arlington opinion, bills in the 81st Congress (H. R. 4710 and S. 2006) were introduced providing for limitations upon the power of the Board with respect to the establishment of branch offices. These bills did not become law. See Sen. Rep. No. 1128, 81st Cong. 1st Sess. (1949).

In 1953, Bill S975, was introduced in the Senate and succeeded in being passed by the Senate in the following year. 100 Cong. Rec. 6001-6011. This proposed law limited association branches to states where branches were allowed to state savings and loan associations and mutual savings banks by the particular state law or custom. Rep. of Comm. of Banking and Currency, Sen. Rep. No. 1156, 83rd Cong. 2nd Sess. 1 (1954). However, this bill was never reported out of the House Committee on Banking and Currency.

In 1955, companion Senate and House bills, S972 and H. R. 5364, were introduced in the 84th Congress, 1st Session. They were identical to S975 of the 83rd Congress. Rep. of Comm. on Banking and Currency, Sen. Rep. No. 518, 84th Cong. 1st Session 1 (1955). Although the Senate passed S972 on June 22, 1955, the House failed to pass the companion bill.

appears to this court that the fact that the Congress
71 has on each such occasion failed to pass measures calculated to bring conformity to state law and usages is entitled to some weight.

It must be abundantly clear that this court must decline the plea of the State of Wisconsin that it depart from the holdings of the cases of *North Arlington National Bank v. Kearny Federal Savings and Loan Association*, 187 F. 2d 568 (C. A. 3, 1951), cert. denied 342 U. S. 816 (1951), *Springfield Institution v. Worcester Federal Savings & Loan Ass'n*, 329 Mass. 184, 107 N. E. 2d 313 (1952), cert. denied 380 U. S. 884 (1952) and *First National Bank of McKeesport v. First Federal Savings & Loan Ass'n of Homestead*, 205 F. 2d 39 (C. A. 3, 1953).

The power of the Board to establish branches pursuant to Section 545.9 having now been determined, there remains only the question whether that Board likewise has the power to provide for the establishment of mobile agencies pursuant to Section 545.8. Analysis of these two sections would appear to be the first step:

"Section 545.8 *Branch offices.* No Federal association shall establish or maintain a branch office without the prior written approval of the Board. Each application by a Federal association for authority to establish or maintain a branch office shall state the need for such branch office, the convenience to be performed, the economics and other factors to be considered, the estimated annual volume of business, income and expenses of such branch office, and such other information as the Board may require. Approval of an application may be conditioned upon the association's maintaining a prescribed annual budget of such amount and for such period of time as the Board may determine. Any branch office established by a Federal association without the approval required by this section shall be considered by the Board to be a mutually agreed upon termination of the status of such office as a branch office, as authorized by the terms of approval. A Federal association shall maintain adequate records of all transactions of each branch office and shall make such reports to the Board with respect to each branch office as the Board may require. Each branch office shall be subject to examination by the Board to the same extent as the home office of the association, and such examination may include examination of such books, records, accounts, and other documents of the association as relate to such branch office. The Board may require the association to furnish it such information as it deems necessary with respect to any branch office, and may require the association to furnish it such information as it deems necessary with respect to any branch office, and may require the association to furnish it such information as it deems necessary with respect to any branch office, and

"Section 145.15. *Agency.* * * * A Federal association may, without approval by the Board, establish or
72 maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions; temporary or incidental agencies may likewise be established for individual transactions or for special, temporary purposes. An original record of all business of a Federal association transacted at any agency thereof shall be kept by such agency and such reports of business so transacted shall be made to a branch office or to the home office of such association as are required for the proper conduct and control of the association's affairs."

From a reading of the above sections, there are but two differences that appear material:

1. Function. The allowable functions and operations of a branch are very substantially broader than those permitted in a limited agency. The approach used in defining the permissible activities of each is revelatory of their broad differences. In describing the vastly greater operations of a branch, the Board specified only the one function that could not be performed by the branch, that is, the approval of loans; all business otherwise being transactable. On the other hand, in defining the functions of a limited agency, the Board precisely spelled out what such agency could do and thereby excluded all other types of operation.

2. Procedure. Procedurally, it appears that no branch office may be established or maintained by an association without the prior written approval of the Board, whereas a limited agency or agencies may be established without prior leave or approval of the Board and solely at the discretion of the officers of the association. Stated another way, it appears that a certificate of approval is issued by the Board only after study has been made of the need for

such branch, the functions to be performed, the personnel and office facilities to be provided, the estimated annual
73 volume of business and the proposed annual budget.

In addition to the criteria set forth in the rule, it appears that in recent years the Board also applies the same tests set out in Section 5(c) of the Home Owners' Loan Act of 1933 that is applied to the application for the original charter. Reports of Committee on Banking and Currency, Sen. Rep. 1186, 83rd Congress, 2nd Session 2 (1954); Sen. Rep. 318, 84th Congress, 1st Session 2 (1955). These tests and the deliberations and judgment consequent thereto are of course in sharp contrast to the complete void of activity or participation by the Board in the establishment of limited agencies.

It seems clear to this court that the same reasoning and authority that established the power of the Board to create branches applies a fortiori with equal force and cogency to the Board's power in respect to the creation of agencies of limited function, provided that in so doing it exercises this power itself, and in so doing, applies the standards expressed or implicit in the statute and the Rules and Regulations thereunder. Indeed, it would be a most curious result to find power on the major plane and deny it on the minor.

Our question therefore narrows down to this: Has an agency of a limited character such as we have in the instant case been legally established where the association itself has applied the tests of need, personnel, location and the like, and the Board itself has failed to take any part in the decision?

Before deciding whether failure of the Board to so act constitutes abdication of duty or sub-delegation of powers, it is necessary to determine what, if anything, is being abdicated or delegated.

74 The establishment of limited function agencies like

the ones involved in the instant case was recognized as far back as 1943. Although Section 145.15 did not become effective in its present form until August 15, 1949, as a part of a general revision of the Rules of the Federal Savings and Loan System (see 14 F. R. 3980, 3991 (1949)), a rule unmbered Section 143.16(c), entitled like the present Section 145.15 "Agency", was in effect. In this old 143.16 (c) there was a provision which eliminated the requirement of the Board administration to give prior approval to agencies servicing mortgage loans and real estate. Before January 1, 1949, this rule was numbered 203.16(c). See 13 F. R. 8273 (1948). During the time when it was numbered in this way, and to be precise on April 27, 1943, an amendment was filed eliminating the requirement of Board administration approval of agencies servicing mortgage loans and real estate. Builetin 19, 8 F. R. 5579 (1943). In this bulletin it is flatly stated:

> "This amendment is deemed to be of a minor and procedural character within the provisions of paragraph (c) of Section 201.2 of the rules and regulations for the Federal Savings and Loan System."

It thus appears from the above history of the development of the Regulation pertaining to limited agencies that the Board has since 1943 treated this limited phase of savings and loan operations as *de minimis*.

An administrative body cannot by its interpretation of the statute under which it operates increase its power beyond that given by the legislative body, but a contemporaneous interpretation by the authorized administrative agency is of weight in determining what the powers are. Since 1943, there has been included in the Rules and Regulations for the Federal Savings and Loan System a provision for the granting of permission for the operation
75 of a limited function agency without prior approval of the Board.

The State of Wisconsin has nowhere demonstrated or claimed that these restricted operations of a limited function agency are other than of a *de minimis* character. It has at no time adduced proof that undue injury or any injury whatsoever has resulted to properly conducted existing local thrift and home-financing institutions, nor has it made any showing that the establishment of such limited function agency with or without the prior approval of the Board is not consonant "with the best practices of local mutual thrift and home-financing institutions in the United States."

The State of Wisconsin has failed to acquit itself of its burden of proof in these respects, if proof there be. We are constrained to agreee with and follow the interpretation of the administrative board that these limited operations are of such minor and procedural character that they do not require formal and deliberate Board action such as is provided for in respect to other phases of savings and loan association activities.

The fears of the State of Wisconsin that a Federal savings and loan association or associations would be able to blanket an entire county are in our opinion without warrant. The comprehensive supervisory powers given to the Board by the Act and Rules and Regulations, if not the sheer economics of the situation, seem to us to be an effective control against abuses or excesses.

It is the opinion of this court that the Board has the authority to establish limited function agencies and to do so in the manner provided in Section 145.15.

76 We further conclude that First Federal Savings and Loan Association in establishing the three limited function agencies did not assert and usurp a prerogative and franchise not conferred upon it by its charter and did not invade the sovereign prerogatives of the United States by whom the charter was granted. We find that in fact it

did establish such agencies rightfully and legally and in pursuance of a valid Regulation, Section 145.15.

The motion of the defendant, First Federal Savings and Loan Association, and the intervening defendant, Federal Home Loan Bank Board, for judgment of dismissal of the action as to each of them is hereby granted.

For the reasons set forth in this opinion which shall stand as and for findings of fact and conclusions of law in this case, the motion of the plaintiff's relator, State of Wisconsin, for summary judgment is hereby denied.

Dated, Milwaukee, Wisconsin, this 18th day of March, 1957.

Robert E. Tehan,
U. S. District Judge.

77 UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

JUDGMENT OF DISMISSAL.

(Filed Mar. 19, 1957. Dale E. Ihlenfeldt, Clerk.)

Order for Judgment having been entered herein on the 18th day of March, 1957, granting the motion of the defendant, First Federal Savings & Loan Association, and the intervening defendant, Federal Home Loan Bank Board, for judgment of dismissal of the action as to each of them, and denying the motion of the plaintiff's relator, State of Wisconsin; for summary judgment;

It Is Ordered that the above-entitled action be and the same is hereby dismissed without costs to either party.

Dated at Milwaukee, Wisconsin, this 19th day of March, 1957.

Dale E. Ihlenfeldt,
United States District Clerk.

78 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—6475) * *

(Filed Apr. 17, 1957. Dale E. Ihlenfeldt, Clerk.)

The deposit by the State of Wisconsin with the Clerk of this Court of a state check in the sum of $250 as security for costs is hereby approved.

Dated this 17th day of April, A.D. 1957.

Robert E. Tehan,
Judge of the U. S. District Court for the Eastern District of Wisconsin.

79 IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

United States of America, ex rel. State of Wisconsin *Plaintiff,* *vs.* First Federal Savings & Loan Association and Federal Home Loan Bank Board, *Defendants.*	Civil Action 6475

NOTICE OF APPEAL.

(Filed Apr. 17, 1957. Dale E. Ihlenfeldt, Clerk.)

Notice Is Hereby Given, That the United States upon the relation of the State of Wisconsin, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 19, 1957.

Dated this 17th day of April, A.D. 1957.

Stewart G. Honeck,
Attorney General of Wisconsin,

Harold H. Persons,
Assistant Attorney General,

Roy G. Tulane,
Assistant Attorney General,
Attorneys for Appellant.

Post Office Address:
Room 114 East,
State Capitol,
Madison 2, Wisconsin.

80 CERTIFICATE OF CLERK.

United States of America,
Eastern District of Wisconsin. } ss:

I, Dale E. Ihlenfeldt, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that the writings annexed to this certificate are the original pleadings, judgment, and other papers; Depositions of John O'Neill and Sylvia Dockery (Transcript included separate from file of pleadings); in the case: United States of America ex rel. State of Wisconsin, *vs.* First Federal Savings & Loan Association, et al., Civil Action No. 6475.

In Testimony Whereof, I have hereunto set my hand and duly affixed the seal of said court at the City of Milwaukee, Wisconsin in said district, this 2nd day of May, 1957.

Dale E. Ihlenfeldt,
(Seal) *Clerk.*

No. 732

In The

Supreme Court Of The United States

October Term, 1957

UNITED STATES OF AMERICA, ex rel.
STATE OF WISCONSIN,

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION,

Respondent,

FEDERAL HOME LOAN BANK BOARD,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEWART G. HONECK
Attorney General of Wisconsin

JOHN D. WINNER
Deputy Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

Attorneys for Petitioner

P. O. Address: Room 114 East
State Capitol
Madison 2, Wisconsin

January 17, 1958

INDEX AND SYNOPSIS OF ARGUMENT

PAGE

OPINION OF THE COURT BELOW 1

JURISDICTION 1

QUESTION INVOLVED 2

STATUTES INVOLVED 3

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF FACTS 4-6

1. Nature of the Case 4

2. Organization of Appellee 4-5

3. Financial policy of the State of Wisconsin 5

4. Procedure Below 6

REASONS FOR GRANTING WRIT 6-7

I. THIS CASE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH, TO THE EXTENT THAT IT HAS BEEN PASSED UPON, IS PROBABLY IN CONFLICT WITH THE DECISIONS OF THIS COURT 6-7

ARGUMENT 7-20

I. Quo warranto is a proper remedy to halt the usurpation of a corporate power or privilege 7

II. The District Court Has Jurisdiction 8

a) Quo warranto actions are permissible in federal district court 8-14

PAGE

b) This is a suit instituted by the United States 14-16

c) The District Court has power to authorize, in the exercise of its discretion, a private relator to institute a quo warranto proceeding in the name and interest of the U. S. when the law officer of the sovereign has refused to act 16-20

CONCLUSION 20

EXHIBIT A 21-29

CASES CITED

Ames v. Kansas, (1884) 111 U. S. 449 9

Gunton v. Ingle, (1834) Fed. Case No. 5870 .....9, 12, 18-19

Income Tax Cases, (1912) 148 Wis. 500 16

Johnson v. Manhattan Ry. Co., (1933) 289 U. S. 479 10

Klein v. Wilson & Co. Inc., (D. C. N. J. 1925) 7 Fed. 2d 772 9

Morin v. City of Stuart, (C. A. 5) 111 Fed. 2d 773 11

North Arlington Nat. Bank v. Kearny Federal Savings & Loan Assn., (1950) 92 Fed. Supp. 481 10

State of Illinois v. Illinois Central R. Co., (1888) 33 Fed. 721 9

State ex rel. Atty. Gen. v. Cunningham, (1892) 81 Wis. 440 19

PAGE

State ex rel. Lamb v. Cunningham, (1892) 83 Wis. 90 .. 19

Territory v. Lockwood, (1865) 3 Wall. 236 9

U. S. ex rel. Crawford v. Addison, (1867) 6 Wall. 291 19

U. S. ex rel. Noel v. Carmody, (1945) 80 App. D. C. 58, 148 Fed. 2d 684 12

Wallace v. Anderson, (1820) 5 Wheat. 291 10

CONSTITUTIONS

United States Constitution

Art. III, sec. 2 3

Wisconsin Constitution

Art. XIV, sec. 3 13

LAWS

United States Laws

Ch. 20, sec. 14, Laws 1789 (1 Stat. 81) 8

STATUTES

United States Statutes

12 U. S. C. A. § 1464 4

28 U. S. C. A. § 1254 (1) 1

1345 .....3, 13, 14, 15

PAGE

1651 ..... 3, 14

(a) 3, 8

28 U. S. C. A. Federal Rules of Civil Procedure, Rule 81 (a) (2) 10-11

R. S. § 563 (14) 13, 14

R. S. § 629 (14) 13, 14

36 Stat. 1162 (1911) 14

Wisconsin Statutes

Sec. 215.02 (20) 5

TEXTS

15 Cyclopedia of Federal Procedure, p. 384, § 85.02 7

High, On Extraordinary Legal Remedies, 3rd ed.

544 7

554-555 17

558 17-18

No.....

In The

Supreme Court Of The United States

October Term, 1957

UNITED STATES OF AMERICA, ex rel.
STATE OF WISCONSIN,

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION,

Respondent,

FEDERAL HOME LOAN BANK BOARD,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Attorney General of Wisconsin on behalf of the State of Wisconsin prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled case on October 21, 1957.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 248 Fed. 2d 804.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1957. The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1).

QUESTION INVOLVED

Do the United States District Courts have jurisdiction to inquire by a proceeding in the nature of a quo warranto into an alleged usurpation of corporate rights and privileges under a federal charter issued to a federal savings and loan association?

The District Court initially granted leave to the State of Wisconsin to file the proceeding herein, and thereafter proceeded to consider the matter on its merits. The Court of Appeals passing solely on the question of jurisdiction held that the District Court did not have power to entertain the action at all.

STATUTES INVOLVED

Title 28 U. S. C. A. § 1651 (a) reads:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28 U. S. C. A. § 1345 reads:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2 of the United States Constitution provides in part:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies to which the United States shall be a party; * * *"

STATEMENT OF FACTS

1. Nature of the Case.

This is an action in the nature of a quo warranto filed by the appellant State of Wisconsin, with the consent of the district court, to test the right of the appellee First Federal Savings and Loan Association to establish three additional offices away from its main office for the purpose of servicing its loans and contracts and managing its real estate.

The district court held that the association had such power under its federal charter, and decided the case against appellant on the merits. The errors relied on are errors of law only.

2. Organization of Appellee.

The defendant association was organized on February 20, 1934 under the provisions of section 5 of the Home Owners' Loan Act of 1933 as amended, 12 U. S. C. A. § 1464.

This section of the federal statutes authorized the Board now known as the Federal Home Loan Bank Board to promulgate rules and regulations for the chartering under federal law of associations to be known as federal savings and loan associations. The defendant-appellee has its place of business at 730 North Water Street, Milwaukee, Wisconsin and conducted its business at a single office in that city for some 20 years since the time of its organization down to November 1, 1954.

On November 1, 1954, acting under purported authority contained in regulation No. 145.15 of the Federal Home

Loan Bank Board, which relates to the powers of savings and loan associations, the defendant association opened three separate offices or agencies in Milwaukee county, one located at 4433 West Fond du Lac Avenue, Milwaukee, one located at 925 Milwaukee Avenue, South Milwaukee, and one located at 6000 West Oklahoma Avenue, Milwaukee, and such stations have been in operation since such time.

As indicated in the opinion of the trial court, these receiving offices are limited offices or agencies and do not carry on the full gamut of functions which could be carried on by a branch office if established under regulation 145.14, but are limited to receiving payments on mortgage loans and land contracts, and managing any real estate owned by the appellee association.

3. Financial policy of the State of Wisconsin.

Wisconsin, as the result of a policy declaration by the legislature, does not allow its financial institutions, such as savings and loan associations or banks to maintain branch offices of any nature, except as to those banks which had branches before the prohibitive law went into effect in 1947.

Section 215.02 (20), Wis. Stats., reads:

> "(20) ONE OFFICE ONLY. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

4. Procedure Below.

As we have indicated in our statement of the issue involved, the United States District Court for the Eastern District of Wisconsn, the Honorable Robert E. Tehan presiding, initially allowed the state to file its information upon a showing that a demand had been made upon the United States Attorney General to file such an information and that he had refused. Thereafter, the District Court considered the case on the merits and ruled against the relator on the ground that the First Federal Savings and Loan Association had not violated its federal charter.

As we have indicated, the Court of Appeals while affirming the lower court held that the lower court should have dismissed the information for lack of jurisdiction.

We seek certiorari.

REASONS FOR GRANTING WRIT

I. THIS CASE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH, TO THE EXTENT THAT IT HAS BEEN PASSED UPON, IS PROBABLY IN CONFLICT WITH THE DECISIONS OF THIS COURT

While we respectfully submit that the question involved is a case of first impression since it has never been passed upon by this court, the inference from the cases which we submit with our argument is that the District Court should have jurisdiction to inquire into alleged usurpation of authority under a federal charter.

The decision below is so far-reaching that it would prevent even the United States Attorney General himself from attempting to file an information in the nature of a quo warranto to inquire into an alleged abuse of a federal charter.

For this reason we submit that it is an important question which should finally be resolved by this court.

ARGUMENT

I. Quo warranto is a proper remedy to halt the usurpation of a corporate power or privilege.

A proceeding in quo warrant is an ancient proceeding brought to try the title of persons exercising any corporate rights, privileges, or franchises, or of a person exercising a public office. 15 Cyclopedia of Federal Procedure, page 384, § 85.02:

> "The ancient writ of quo warranto was a high prerogative writ in the nature of a writ of right for the King, against one who usurped or claimed any office, franchise, or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right."
>
> High, On Extraordinary Legal Remedies 3rd ed. 544.

II. The District Court Has Jurisdiction.

a) Quo warranto actions are permissible in federal district court

Defendant-appellee (hereinafter called First Federal) and Intervenor-Appellee (hereinafter called Government) do not dispute that quo warranto is a proper action in this case, but they insist that the Federal District Court does not have jurisdiction over quo warranto actions.

Title 28 U. S. C. A. § 1651 (a) reads:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The broad phrase "all writs" would seem quite clearly to include the writ of quo warranto. This statute has remained substantially the same since it was originally passed by the First Congress in ch. 20, sec. 14, Laws 1789 (1 Stat. 81), when it read:

> "All the beforementioned courts of the United States [Supreme, Circuit and District] shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

(For subsequent history see R. S. 1878 § 716; Mar. 3, 1911, c. 231 § 262, 36 Stat. 1162; Title 28 USC 1940 ed. § 377; June 25, 1948 c. 646, 62 Stat. 944.)

Note that the only material change that affects quo warranto was the deletion of the words "not specially provided for by statute" from the wording of the present statute passed in 1948. The significance of this deletion, if for any purpose other than the elimination of an unnecessary phrase, would appear to be that the statute is even broader after the elimination of one of the qualifications; that "all writs not specially provided for" may be issued. Now, presumably, all writs whether specially provided for or not may be issued, subject still of course to the remaining qualifications that they be "necessary or appropriate in aid of their respective jurisdictions, and agreeable to the usages and principles of law."

The language in federal court opinions on the subject indicates that quo warranto is a type of remedy that can be obtained in federal court if the case is proper in other ways. The following cases have held that quo warranto actions are permissible in federal courts either originally or as removal cases from state courts.

Ames v. Kansas, (1884) 111 U. S. 449;

Klein v. Wilson & Co. Inc., (D. C. N. J. 1925) 7 Fed. 2d 772;

Gunton v. Ingle, (1834) Fed. case No. 5870;

State of Illinois v. Illinois Central R. Co., (1888) 33 Fed. 721.

In cases denying federal jurisdiction over certain quo warranto proceedings, the courts have done so not because relief in a quo warranto action was beyond their powers, but because some other requirement was not satisfied. In *Territory v. Lockwood,* (1865) 3 Wall. 236 and *Wallace*

v. Anderson, (1820) 5 Wheat. 291, the court dismissed the actions because they were not brought in the name of the federal government. However, the court clearly implied that the action could have been brought by the government. In a similar case, *Johnson v. Manhattan Ry. Co.*, (1933) 289 U. S. 479, the court said at p. 502:

> "* * * It [quo warranto] is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States * * *."

Also in *North Arlington Nat. Bank v. Kearny Federal Savings & Loan Assn.*, (1950) 92 Fed. Supp. 481, 482, the court in holding that a competitor cannot sue to attack the validity of a savings and loan association branch office said: "Such action is reserved to the government in an action analogous to a quo warranto proceeding."

These cases, while refusing to allow quo warranto actions on other grounds, clearly stand for the proposition that a quo warranto proceeding is *possible* in federal court. Common sense fortifies this conclusion, for if quo warranto were not allowed in federal court our federal government would have no power to prevent corporations, existing under a federal grant or charter, from exceeding the powers granted them.

Further evidence of the fact that Congress intended that quo warranto actions could be brought in federal court is the specific mention of quo warranto actions in Title 28 U. S. C. A., Federal Rules of Civil Procedure, Rule 81 (a) (2):

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise

> than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, *quo warranto*, and forfeiture of property for violation of a statute of the United States. * * *" (Emphasis supplied.)

Congress would hardly provide for the procedure to be used in quo warranto actions if federal courts were not intended to have jurisdiction over them.

Appellees cite only *Morin v. City of Stuart*, (C. A. 5) 111 Fed. 2d 773, 775-776 in support of their contention that federal district courts "have not the right to exercise the quo warranto jurisdiction." The *Morin* case was a suit for an injunction by a landowner to restrain a Florida city from levying, assessing and attempting to collect taxes on lands on the ground that such lands were not legally part of the city. The court held that this suit constituted a "collateral attack upon the corporate existence of the defendant, and that not injunction but quo warranto in the state court, is the appropriate, indeed the exclusive remedy." The statement quoted in the government's brief occurs in the following context:

> "However clear this matter now may be to the courts of Florida which have the right to exercise both injunctive and quo warranto jurisdiction, it is certainly not clear to the federal courts, *which have not the right to exercise the quo warranto jurisdiction*, and unless it is absolutely plain, under the state court decisions that there is injunctive jurisdiction in a matter of this kind, it is the duty of the federal court to decline jurisdiction and to remit the matter to the state courts."

Thus the chief basis for the court's decision was the fact that the plaintiff had chosen the wrong remedy, injunction instead of quo warranto. Moreover, the court felt that the quo warranto jurisdiction to try the corporate authority of a municipality was within the exclusive province of the sovereign granting the charter, the State of Florida. The case certainly is not authority for declaring that federal district courts have no quo warranto jurisdiction.

The government advances the further argument that quo warranto is not permissible in any federal district other than the District of Columbia, because such jurisdiction is conferred specially only in the District of Columbia Code. It is understandable why the District of Columbia has its own special Code. It presents a unique and special governmental situation, not being one of the 48 states, but being under direct federal control. Many laws pertaining to this district are special for this reason.

As a matter of fact, even the District of Columbia federal court allowed quo warranto actions *before* the District of Columbia Code was passed in 1901. The case of *Gunton v. Ingle, supra,* (1834), was decided prior to the passage of the Code, when only the general jurisdictional provisions and the "all writs" statute applied to the District of Columbia court. This case held that a quo warranto action could be brought in federal court. Subsequent to the enactment of the District of Columbia Code, the District of Columbia court has recognized that the provision relating to quo warranto proceedings "obviously leaves the former common law principles governing the issuance of quo warranto in full force." *U. S. ex rel. Noel v. Carmody,* (1945) 80 App. D. C. 58, 148 Fed. 2d 684.

Since all federal courts had power to entertain proper quo warranto actions *before* the D. C. Code, it seems only logical that the passage of this statute, under the special circumstances present in the District of Columbia, did not remove from all other district courts this power derived from the "all writs" statute, in effect continuously since 1789.

One other special statute is relied upon by the government in its argument that quo warranto actions are not allowable. The government cites Rev. Stat. §§ 563 (14), 629 (14). This statute passed on May 31, 1870 (ch. 114, sec. 23, 16 Stat. 146) gave district courts (§ 563) jurisdiction over: "all proceedings by writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office * * *" (except members of Congress and state legislatures) contrary to Art. XIV, sec. 3, of the Constitution.

Since the traditional use of quo warranto proceedings was to allow a sovereign to halt usurpation of those offices or franchises existing by virtue of that sovereign, it is apparent that this statute departs from that traditional use of quo warranto. This statute was designed to allow federal courts to try post-civil war insurrection cases involving officers of states and municipalities whose offices derived from a different sovereign, a State. It was undoubtedly felt that some state sovereigns were unable to provide an adequate and just forum in which to challenge the conduct of their state and municipal officers.

At the time of the judicial revision of 1911, the statute was repealed, probably because the need for this extension of quo warranto jurisdiction over offices of another sover-

eign (the States) had now subsided. This special use of quo warranto in no way affects the power of federal courts to hear quo warranto cases, involving federal offices and corporations, authorized by the "all writs" statute and Title 28 U. S. C. A. § 1345.

R. S. § 563 (14) was located in the chapter that contained a list of the cases over which jurisdiction was granted to district courts; the chapter was entitled "Jurisdiction of District Courts." Unlike this statute the "all writs" statute was placed in the Rev. Stat. of 1878 and in the revision of 1911 (36 Stat. 1162) in a chapter entitled "Provisions Common to More than One Court." The present "all writs" section is listed under "Procedure—General Provisions" in Title 28 U. S. C. A. § 1651.

We point to the location of these statutes to illustrate that R. S. §§ 563 (14) and 629 (14) were statutes conferring special subject matter jurisdiction upon the federal district and circuit courts, while the "all writs" statute has always been a procedural statute authorizing certain types of actions (including quo warranto) where the court otherwise has jurisdiction by virtue of the jurisdictional statute.

b) This is a suit instituted by the United States

The government argues that even if the "all writs" statute does include quo waarrnto actions (and we have shown that it does) nevertheless this statute does not confer additional judisdictional authority. We agree with this contention to the extent that jurisdiction over the dispute must be found somewhere in the jurisdiction statute.

It is our contention that the "all writs" statute allows quo warranto proceedings if the federal court has jurisdiction over the case. We have illustrated that quo warranto actions are permissible and will now deal with the jurisdiction of the court over the dispute.

Title 28 U. S. C. A. § 1345 reads:

> "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

If the United States through the U. S. Attorney General were initiating this action (assuming that quo warranto is a permissible action under the "all writs" section), the conclusion that the court has jurisdiction by virtue of § 1345 is inescapable; the statute covers the case precisely.

However, the government contends that this is a suit by Wisconsin, and not actually by the United States. This contention may stem from a misunderstanding of the nature of a quo warranto. In a proceeding for quo warranto, the gravamen of the action is the injury to the sovereign arising out of the abuse or usurpation of a franchise granted by the sovereign, and the sovereign whose franchise is being abused is the real party in interest in the action. The relator, whether he be the sovereign's appointed Attorney General or some other person who calls the injury to the attention of the sovereign's justices (who are also its representatives and in early days of the common law in fact functioned practically as deputy kings) is only the informant, need not necessarily derive any personal benefit from

the institution of the action, and is not the real party in interest.

The Wisconsin supreme court aptly described the interest of the sovereign and the nature of a quo warranto action in *Income Tax Cases*, (1912) 148 Wis. 500, as follows:

> "This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself when it appears necessary to vindicate or protect its prerogatives or franchises or the liberties of the people, the state uses it to punish or prevent wrongs to itself or the whole people; *the state is always the plaintiff*, whether the action be brought by the Attorney General, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit, he is a mere incident; he brings the public injury to the attention of the court, and the court, by virtue of the power granted by the constitution, commands that the suit be brought by and for the state." (Emphasis supplied.)

c) The District Court has power to authorize, in the exercise of its discretion, a private relator to institute a quo warranto proceeding in the name and interest of the U. S. when the law officer of the sovereign has refused to act.

The proposed information filed with the petition for leave in this matter shows that under date of October 29, 1954, a formal demand was made upon the United States Attorney General, Hon. Herbert Brownell, to institute this action to determine whether or not the defendant association was exceeding the franchise granted to it by the United States, and that on November 5, 1954, the Attorney General formally declined to institute or participate in such action.

In High, On Extraordinary Remedies, pp. 554-555, it is stated:

"§ 602. Before the statute of Anne, the information in the nature of a quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation upon the franchises or liberties granted by the crown, and it was never used as a remedy for private citizens desiring to test the title of persons claiming to exercise a public franchise. And although such informations were exhibited by the king's attorney-general long before this statute, yet the remedy thereby given was never enlarged beyond the limits prescribed for the original writ of quo warranto, which extended only to encroachments upon the royal prerogative. Hence the information, as a means of investigating and determining civil rights between parties, may be said to owe its origin to the statute of Anne, which authorized the filing of the information, by leave of court, upon the relation of any person desirous of prosecuting the same, for usurping or intruding into any municipal office or franchise in the kingdom. * * *

"§ 603. The original writ of quo warranto was strictly a civil remedy, prosecuted at the suit of the king by his attorney-general, and in case of judgment for the king the franchise was either seized into his hands, if of such a nature as to subsist in the crown, or a mere judgment of ouster was rendered to eject the usurper. * * *"

At page 558 of High, On Extraordinary Remedies, it is stated:

"* * * And the principle is now firmly established, that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made,

> even though there is a substantial defect in the title by which the office or franchise is held. * * * The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application. * * *"

The government contends that Wisconsin cannot sue in the name of the United States; that only the United States Attorney General is authorized to do this. The cases they cite to his effect do not involve quo warranto actions and do not deal with the nature of this unique proceeding.

When the power was conferred upon the district courts by the 1789 "all writs" act to proceed in an action in quo warranto, the courts took that writ as it existed at common law at the time of the adoption of the Constitution together with the practice then established for some 700 years in the English courts. They took it with the power to determine themselves on behalf of the sovereign whether there had been an injury to the sovereign which should be subjected to judicial scrutiny.

There is nothing novel in the principle that the court itself may be the representative of the sovereign for the purpose of determining whether one of the prerogative writs such as quo warranto may be allowed. At common law it is at least as old as the Statute of Anne, 1710. A district court in *Gunton v. Ingle,* (C. C. D. C. 1834) Fed. case 5870, said:

> "I am satisfied that an information may be sustained at the relation of a private person against a person usurping an office under a private corporation; that is in the discretion of the court to allow or to refuse to allow such an information to be filed. It must

> be a case in which the public is concerned or in which the authority of the United States is contemned [sic.] or abused."

This case arose in the District of Columbia before the special provision for quo warranto in the D. C. Code.

In *U. S. ex rel. Crawford v. Addison,* (1867) 6 Wall. 291, the court said:

> "Crawford then proceeded by quo warranto in Federal Court of the District to test Addison's right to the place; the proceeding being in the *usual form of one by the United States at the relation of the party aggrieved.*" (Emphasis supplied.)

See the Wisconsin cases of *State ex rel. Atty. Gen. v. Cunningham,* (1892) 81 Wis. 440 and *State ex rel. Lamb v. Cunningham,* (1892) 83 Wis. 90, for further judicial description of the nature of the remedy of quo warranto. The court said in the latter case at page 134: "We must hold that refusal of the Attorney General to bring or consent to bring this suit did not prevent this court from righfully taking jurisdiction of the same upon the relation of a private citizen."

In the present case the United States Attorney General, as we anticipated he would, felt duty bound to defend the position of the Home Loan Bank Board, one of his statutory clients. That is both his right and privilege, but when he has made that decision let him defend upon the merits and not attempt to foreclose a judicial inquiry into the soundness of his position.

We recognize that only the United States can bring a quo warranto to examine into a federal charter, that such

action must be authorized by some branch of the United States government, that if the U. S. Attorney General refuses to bring the action authorization is discretionary with the court to which a petition is addressed. The District Court, in the exercise of that discretion, decided that there were sufficient public considerations involved and authorized Wisconsin to sue in the name and interest of the United States.

CONCLUSION

We respectfully submit that the judgment of the Court of Appeals should be reversed and the right of the United States as sovereign to inquire into an abuse of a corporate charter granted by the United States by a proceeding in the nature of a quo warranto should be declared.

Respectfully submitted,

STEWART G. HONECK
Attorney General of Wisconsin

JOHN D. WINNER
Deputy Attorney General of Wisconsin

ROY G. TULANE
Assistant Attorney General of Wisconsin

Attorneys for Petitioner

EXHIBIT A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 12031 SEPTEMBER TERM AND SESSION, 1957

UNITED STATES OF AMERICA EX REL. STATE OF WISCONSIN,
Plaintiff-Appellant,
v.
FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION AND FEDERAL HOME LOAN BANK BOARD,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

October 21, 1957

Before DUFFY, *Chief Judge*, SCHNACKENBERG AND HASTINGS, *Circuit Judges*.

HASTINGS, *Circuit Judge*. This is an appeal by the state of Wisconsin from an order dismissing an action in the nature of a *quo warranto* filed by it in the name of the United States, with the consent of the district court, against appellee, First Federal Savings and Loan Association of Milwaukee, Wisconsin.

First Federal is a savings and loan association which operated from 1934 to 1954 at a single office in Milwaukee under a charter granted by the Federal Home Loan Bank Board pursuant to the Home Owners' Loan Act of 1933,

12 U. S. C. A. 1461 et seq., and the Board's Regulations under that Act, 24 C. F. R. 141.13-141.15, inclusive.

In 1954, under authority of the Board's Regulation No. 145.15, First Federal established three limited agency offices in Milwaukee for servicing its mortgage loans and contracts and managing its real estate. These limited agencies did not accept applications for or negotiate loans and rendered no service in connection with savings accounts, these matters being handled exclusively at the main office.

In 1947, Wisconsin adopted a statute which prohibits its state financial institutions from operating agencies. Section 215.02(20) of the Wisconsin statute reads:

> "(20) ONE OFFICE ONLY. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

On October 29, 1954, Wisconsin made a formal demand upon the United States Attorney General to institute this action to determine whether or not First Federal was exceeding its charter and operating contrary to the policy of the state. The Attorney General formally replied (citing decisions of the courts supporting the action of First Federal) and refused to have such action instituted in the name of the Attorney General, *"even assuming that quo warranto would be the appropriate type of proceeding in such a situation."* (our emphasis).

Following this refusal, the Attorney General of Wisconsin filed a petition in the United States District Court for the Eastern District of Wisconsin in the name of "United States of America *ex rel.* State of Wisconsin, Plaintiff", asking leave to file an information in the nature of a *quo warranto* to test the right of First Federal to establish the three limited agency offices. After a proper hearing, such

leave was granted and the information was filed. Since the proceeding directly challenged the validity of the Regulation under which First Federal established the agencies, 24 C. F. R. 145.15, the Federal Home Loan Bank Board intervened in the action. The facts were stipulated, including the depositions of two witnesses describing the operations carried on at the agencies in question.

Under these facts, Wisconsin moved for summary judgment, having asserted in its information that the Regulation (24 C. F. R. 145.15) "is null and void in that it is beyond the powers delegated to the Home Loan Bank Board by Congress", "is an invalid subdelegation of the powers of the board itself, and hence is not a part of the charter issued to defendant by the United States", and that "the establishment of branch or receiving agencies of savings and loan associations in thhe state of Wisconsin is prohibited by sec. 215.02(20) of the Statutes of the State of Wisconsin." First Federal and the Board then moved to dismiss the action on the grounds that the court lacked jurisdiction to entertain such an action in *quo warranto*, that the state of Wisconsin had no authority to use the name of the United States in maintaining such an action, that the state of Wisconsin had not exhausted administrative remedies, and that no claim had been stated upon which relief could have been granted.

The district court assumed, without deciding, that it had jurisdiction to entertain the instant action and, on the merits, found that First Federal had acted lawfully in pursuance of a valid regulation. Accordingly, the court granted the motions for dismissal and denied the motion for summary judgment.

The contested issues are whether the district court has jurisdiction over a *quo warranto* action filed by the state of Wisconsin in the name of the United States to challenge the assertion of corporate authority by a federally chartered corporation after the United States Attorney General

had formally declined to file such an information, and whether the Regulation of the Federal Home Loan Bank Board, which authorizes federal savings and loan associations to establish limited agencies, is valid.

We find ourselves in accord with the district court's well considered opinion on the merits of this case, but the issue of jurisdiction rises to meet us first. As will appear later, we cannot give further consideration to affirmance of the judgment below on the merits if our determination of jurisdiction is adverse to the relator. The question of jurisdiction is basic and fundamental and cannot be ignored. It has been raised by appellees throughout this proceeding. Since we believe its determination is of paramount necessity here we shall give it first considration.

The district court said, on the issue of jurisdiction:

> "* * * being of the opinion that the relator * * * had made a showing that a substantial issue existed, ordered that it be granted leave to file its information in the nature of *quo warranto* * * *."
>
> "The assertion of the right of the State of Wisconsin or any person to bring an action in the nature of *quo warranto* without the consent of the Attorney General of the United States, *raises a substantial question*. This court is inclined, however, to the opinion that if the defendant Association in asserting the right to maintain agencies is asserting and usurping a prerogative and franchise not conferred upon it by its charter and is invading the sovereign prerogatives of the United States by whom the charter was granted, the sovereign State of Wisconsin has standing to employ the extraordinary writ of *quo warranto* to test the legality of the Association so to act. We are of the further mind that the State of Wisconsin is not required to seek its remedy by use of the administrative procedure under the Act nor is it required to use less

extraordinary remedies before resorting to *quo warranto. We assume these procedural points,* however, *and do not decide them,* since our decision does not turn upon them." (our emphasis).

The modern information in the nature of a *quo warranto* is an extraordinary remedy and has been defined "as an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, mis-user, or non-user, of a public office or corporate franchise * * * and while still retaining its criminal form, it has long since come to be regarded as, in substance, a civil proceeding, instituted by the public prosecutor, upon the relation of private citizens, for the determination of purely civil rights." High, Extraordinary Legal Remedies, 2d Ed., p. 458. The origin of the original writ itself is to be found in the earliest history of the common law. The employment of the original writ, its subsequent limitation by statute, its lapse into disuse in England, the usurpation of its place by the modern remedy of an information and the recognition of the remedy by constitutional and statutory provisions in the various jurisdictions are all the subject of an interesting historical development to be found in Chapter XIII of High's treatise on this subject. It is further pointed out that jurisdiction in this country is generally fixed by the constitutions and statutes of the several states. "Since the remedy by *quo warranto,* or information in the nature thereof, *is only employed to test the actual right to an office or franchise, it follows that it can afford no relief for official misconduct and can not be employed to test the legality of the official action of public or corporate officers.*" (our emphasis). High, *supra,* p. 485.

An examination of several of the statutes authorizing the use of this extraordinary remedy reveals that its application is rather broad but specifically limited to the use therein provided. There have been submitted to this court

only two instances in which original *quo warranto* jurisdiction has been specifically conferred upon federal district courts. The revised statutes of 1878 vested jurisdiction in these courts of proceedings brought by the United States Attorney for the removal of persons holding office contrary to the Fourteenth Amendment. Rev. Stat., Sections 563(14), 626(14), (1786). This Act was repealed in the Judicial Code of 1911, 36 Stat. 1168. In 1901, Congress specifically authorized the United States District Court for the District of Columbia to issue *quo warranto* in the name of the United States. Act of March 3, 1901, 31 Stat. 1419, Title 16, Section 1601 of the D. C. Code (1940). However, this grant is strictly limited and is confined solely to situations involving franchises and public offices held within the District of Columbia. There is no other specific statutory provision vesting original jurisdiction in the district courts in *quo warranto* actions. In construing this statute, the Court of Appeals for the District of Columbia held that it did not apply where the plaintiff sought relief from alleged misconduct of a corporation and that *quo warranto* was not an appropriate remedy for attempted revocation of the corporate charter of a bar association on the ground of alleged abuse and misuse of its charter. *United States ex rel. Robinson* v. *Bar Association of District of Columbia*, D. C. Cir., 197 F. 2d 408 (1952).

The general jurisdiction of federal district courts is limited and defined strictly by statute. We cannot look beyond Congressional enactments to determine the extent or scope of this jurisdiction. In the absence of specific statutory provision, Wisconsin relies on two sections of Title 28 U. S. C. A., 1345 and 1651(a). Section 1345 provides:

> "Except as otherwise provided by Act of Congress the district courts have original jurisdiction of all civil actions, suits or proceedings commenced by the United States or by any agency or officer thereof expressly authorized to sue by Act of Congress."

This suit is not one commenced by the United States or any of its officers or agencies. In fact, the United States Attorney General expressly refused to institute this action. It is admittedly filed by the state of Wisconsin. While technically it is filed in the name of the United States ex rel. State of Wisconsin, it is in effect a suit by the state of Wisconsin, and not a suit by the United States.

Section 1651(a), *supra*, provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This provision does not enlarge or expand the jurisdiction of the courts but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and already lodged in the court. *Covington and Cincinnati Bridge Co.* v. *Hagar*, 203 U. S. 109, 111 (1906), and *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, 197 U. S. 536 (1905). The statute presupposes existing complete jurisdiction and does not contain a new grant of judicial power. In passing upon the meaning and purpose of this section this court has said:

> "[w]hile the section augments the power of the court in cases of existing jurisdiction it in no wise expands or extends its territorial jurisdiction." *Edgerly* v. *Kennelly*, 7 Cir., 215 F. 2d 420, 422 (1954).

There are few authorities touching upon the jurisdiction of a district court to entertain an information in the nature of *quo warranto*. "No instance is known of the use of writ of *quo warranto* in a district court of the United States other than the District Court of the District of Columbia." Cyc. of Federal Procedure, 2d Ed., Sec. 7098. The court, in *United States* v. *Malmin*, 3 Cir., 272 Fed. 785, 790 (1921) indicated that *quo warranto* is the proper remedy to try the title of a judge of a court of the United States but

did not indicate in what court it could be entertained. In a suit to enjoin defendant city from levying taxes the court noted that the state law provided the exclusive remedy in an action for *quo warranto* and stated, "* * * *the federal courts, * * * have not the right to exercise the quo warranto jurisdiction* * * *." (our emphasis). *Morin* v. *City of Stuart*, 5 Cir., 111 F. 2d 773, 775 (1940). Doubt was expressed that federal courts have *quo warranto* jurisdiction, except as specifically authorized by statute in *Cleveland Cliffs Iron Co.* v. *Village of Kinney*, 262 Fed. 980, 984 (1919) and *In Re Yancey*, 28 Fed. 445, 451 (1886).

A parallel may be drawn between *quo warranto* and mandamus on this question of jurisdiction of the federal district courts. It has been repeatedly held that mandamus may not issue in the district court unless it is necessary for the exercise of independently conferred jurisdiction. In the case of *Marshall* v. *Crotty*, 1 Cir., 185 F. 2d 622, 626, 627 (1950), the leading cases are cited to this effect. The court goes on to point out that in Title 28 U. S. C. A., 1331, the phrase "all civil actions" does not enlarge the jurisdiction of the district courts to vest in them general original jurisdiction in cases of mandamus.

We hold, except as otherwise specifically provided by statute, that there is no original jurisdiction in the federal district court to entertain an information in the nature of *quo warranto*. This makes it unnecessary for us to pass upon the other questions raised in this appeal. It follows that the district court in this case should have dismissed the action for want of jurisdiction instead of determining it upon the merits. The judgment dismissing the action is therefore modified so as to show that the case was dis-

missed for want of jurisdiction, and, as thus modified the judgment is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
FEB 14 1958
JOHN T. FEY, Clerk

No. 732

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, EX REL. STATE OF WISCONSIN, PETITIONER

v.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION AND FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT FEDERAL HOME LOAN BANK BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General,
MORTON HOLLANDER,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	3
Argument	5
Conclusion	14
Appendix	15

CITATIONS

Cases:

Amchanitzky v. *Sinnott*, 69 F. 2d 97	7
Ames v. *Kansas*, 111 U. S. 449	5, 9
Booth v. *Fletcher*, 101 F. 2d 676, certiorari denied, 307 U. S. 628	8
Brooks v. *Dewar*, 313 U. S. 354	14
Confiscation Cases, 7 Wall. 454	8
Covington and Cincinnati Bridge Co. v. *Hager*, 203 U. S. 109	7
Edgerly v. *Kennelly*, 215 F. 2d 420, certiorari denied, 348 U. S. 938	7
First Federal Savings & Loan Ass'n v. *Loomis*, 97 F. 2d 831, certiorari granted, 305 U. S. 564, writ dismissed on motion of petitioners, 305 U. S. 666	8
First National Bank of McKeesport v. *First Federal Sav. & L. Ass'n*, 225 F. 2d 33	11
Franklin Nat. Bank v. *New York*, 347 U. S. 373	13
Grace Line v. *Panama Canal Company*, 243 F. 2d 844, pending on writ of certiorari, Nos. 251, 252, this Term	9
Knapp v. *Lake Shore Railway Co.*, 197 U. S. 536	7
Marshall v. *Crotty*, 185 F. 2d 622	7
Morin v. *City of Stuart*, 111 F. 2d 773	6
Newman v. *United States ex rel. Frizzell*, 238 U. S. 537	6
North Arlington Nat. Bank v. *Kearny Fed. Sav. & L. Ass'n*, 187 F. 2d 564, certiorari denied, 342 U. S. 816	11, 12, 13

Cases—Continued

	Page
Petrowski v. *Nutt*, 161 F. 2d 938, certiorari denied, 333 U. S. 842	7
Springfield Institution for Sav. v. *Worcester Fed. Savings & Loan Assn.*, 329 Mass. 184, 107 N. E. 2d 315, certiorari denied, 344 U. S. 884	11, 12, 13
State ex rel. Cleary v. *Hopkins Street B. & L. Asso.*, 217 Wis. 179, 257 N. W. 684, affirmed, 296 U. S. 315	9
United States v. *Morris*, 10 Wheat. 246, affirming Fed. Cas. No. 15,816	8
United States v. *San Jacinto Tin Co.*, 125 U. S. 273	8
United States ex rel. West v. *Doughty*, Fed. Cas. No. 14,986	8
Statutes and Regulations:	
Act of March 3, 1901, 31 Stat. 1189, 1419–20	6
Home Owners' Loan Act of 1933, Act of June 13, 1933, 48 Stat. 128, 12 U. S. C. 1461, *et seq*	3
Sec. 1 (12 U. S. C. 1461)	15
Sec. 2 (a) (12 U. S. C. 1462 (a))	15
Sec. 2 (d) (12 U. S. C. 1462 (d))	15
Sec. 5 (a) (12 U. S. C. 1464 (a))	13, 15
Sec. 5 (c) (12 U. S. C. 1464 (c))	15
Sec. 5 (d) (1) (12 U. S. C., Supp. IV, 1464 (d) (1))	16
Sec. 5 (e) (12 U. S. C. 1464 (e))	16
Judicial Code of 1911, 36 Stat. 1087, 1168	6
Judicial Code (as revised, 1948), Act of June 25, 1948, 62 Stat. 869, 992–3	6
Rev. Stat., §§ 563 (14), 629 (14), 1786	6
5 U. S. C. 309, 316	8
28 U. S. C. 507	8
28 U. S. C. 1345	2, 5, 6, 7, 9
28 U. S. C. 1651 (a)	2, 5, 6, 7
District of Columbia Code (1951 ed.), § 16–1601	6
Wisconsin Stats., § 215.02 (20)	12
Federal Home Loan Bank Board Regulations, 24 C. F. R. 141.1, *et seq*	3
24 C. F. R. 145.13	16
24 C. F. R. 145.14	10, 17
24 C. F. R. 145.15	3, 4, 10, 17

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 732

UNITED STATES OF AMERICA, EX REL. STATE OF WISCONSIN, PETITIONER

v.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION AND FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT FEDERAL HOME LOAN BANK BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin (R. 47)[1] is reported at 151 F. Supp. 690. The opinion of the Court of Appeals for the Seventh Circuit (Pet. 21) is reported at 248 F. 2d 804.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1957. The petition for a writ of cer-

[1] Record references are to the pages of the printed "Appendix for Plaintiff-Appellant" filed by petitioner in this Court.

tiorari was filed on January 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

This is a *quo warranto* action filed by the State of Wisconsin in the name of the United States to challenge the right of a federally chartered savings and loan association to establish certain limited agency offices away from its main office. Since the Regulations of the Federal Home Loan Bank Board, which chartered the association, explicitly authorize the association to establish such additional offices, the United States Attorney General rejected Wisconsin's demand that he institute the present *quo warranto* action. Wisconsin then filed the action in the name of the United States.

The question presented is whether the court below, which expressly noted its agreement with the trial court's holding that the Regulation was valid, correctly held that because of the absence of any specific statutory authority the district court had no jurisdiction over the *quo warranto* action.

STATUTES AND REGULATIONS INVOLVED

1. The provisions of 28 U. S. C. 1345 and 28 U. S. C. 1651 (a), upon which petitioner relies to sustain the trail court's jurisdiction, are set forth at page 3 of the petition.

2. The relevant provisions of the Home Owners' Loan Act of 1933 (Act of June 13, 1933, 48 Stat. 128, 12 U. S. C. 1461, *et seq.*) and of the Regulations of the Federal Home Loan Bank Board are set forth in the Appendix *infra*, pp. 15–18.

STATEMENT

This *quo warranto* action was filed by the State of Wisconsin, in the name of the United States, against respondent First Federal Savings and Loan Association of Milwaukee in the United States District Court for the Eastern District of Wisconsin (R. 2; Pet. 4). First Federal is a savings and loan association which operated from 1934 to 1954 at a single office in Milwaukee under a charter granted by the Federal Home Loan Bank Board pursuant to the Home Owners' Loan Act of 1933 (Act of June 13, 1933, 48 Stat. 128, 12 U. S. C. 1461, *et seq.* *infra*, p. 15) and the Board's Regulations under that Act (24 C. F. R. 141.1, *et seq.*; R. 5, 49; *infra*, p. 16).

In 1954, First Federal, in accordance with rights expressly conferred by the Regulations (24 C. F. R. 145.15, *infra*, p. 18), established three limited agency offices in Milwaukee for the servicing of mortgage loans and contracts (R. 50, 57, note 1). These limited agencies, in servicing the loans, kept loan files and received monthly payments on the loans (R. 50). Loans themselves were not negotiated at the limited agencies (R. 50). Nor were applications for loans taken at these agencies; they were always referred to the main office (R. 50). Similarly, the three agencies rendered no service at all in connection with the "savings" aspect of First Federal's business (R. 50). All "savings share" transactions, including applications for accounts, opening of accounts, and deposits to such accounts, were handled exclusively at the main office (R. 50).

The stated purpose of Wisconsin's action was "to test" First Federal's right "to establish [these] three additional [agency] offices away from its main office" (Pet. 4; R. 50). Since Wisconsin's suit directly involved the validity of the Regulation pursuant to which First Federal had established the agencies (24 C. F. R. 145.15, *infra*, p. 17), respondent Federal Home Loan Bank Board intervened in the action (R. 1, 6, 46).

On the facts set forth above, Wisconsin moved for summary judgment, asserting that the Regulation is beyond the "powers delegated to the Home Loan Bank Board by Congress," "is an invalid subdelegation of the powers of the board", and is in conflict with "sec. 215.02 (20) of the Statutes of the State of Wisconsin" which prohibits savings and loan associations from maintaining "any branch offices, paying or receiving stations, [or] agencies" (R. 6, 7, 44). First Federal and the Board then moved to dismiss the action (R. 14, 23).

The trial court assumed, without deciding, that it had jurisdiction over the *quo warranto* action (R. 52–53; Pet. 23). Reaching the merits, the court, after a thorough review of the pertinent authorities, found "that in fact [First Federal] did establish [the] agencies [in question] rightfully and legally and in pursuance of a valid Regulation, Section 145.15" (R. 67–68). Accordingly, the court granted First Federal's and the Board's motions to dismiss and denied Wisconsin's motion for summary judgment (R. 68).

The court of appeals affirmed (Pet. 29). It expressly noted its "accord with the district court's" holding that the Regulation was valid (Pet. 24). However, the court of appeals ruled that, since no statute conferred jurisdiction, the *quo warranto* action should have been dismissed by the district court for want of jurisdiction (Pet. 28–29).

ARGUMENT

The holding below that the district court lacked jurisdiction over this *quo warranto* proceeding is, we believe, plainly correct. Petitioner, in challenging that holding, relies primarily on 28 U. S. C. 1345 and 1651 (a) and on an asserted conflict with this Court's opinion in *Ames* v. *Kansas*, 111 U. S. 449 (Pet. 6–9). We show below that the statutory provisions have no application here and that the conflict is illusory. In any event, the decision below is supportable on a ground completely independent of the jurisdictional question. There is, therefore, no reason to resolve the asserted conflict since the complaint cannot lead to ultimate recovery or relief.

1. The jurisdiction of a federal district court is, of course, limited to that which has been expressly conferred by act of Congress. It is equally clear that, with the exception of District of Columbia courts, there is no statute conferring *quo warranto* jurisdiction on the federal district courts.[2] It follows, as ob-

[2] The history of the federal statutes pertaining to original *quo warranto* jurisdiction confirms the fact that such jurisdiction may be exercised by the United States District Court for the District of Columbia and by no other federal court. The Revised Statutes of 1878 specifically vested both the di-

served by the court below, that there is no original jurisdiction in the federal district court to entertain an information in the nature of *quo warranto* (Pet. 28). See *Morin* v. *City of Stuart,* 111 F. 2d 773, 775 (C. A. 5) (holding that the federal district courts "have not the right to exercise the quo warranto jurisdiction").

Wisconsin, in endeavoring to escape the impact of this jurisdictional bar, relies on the "all-writs" statute, 28 U. S. C. 1651 (a), and on 28 U. S. C. 1345, relating to suits filed by the United States (Pet. 8). Neither

---

trict courts and the former circuit courts with jurisdiction of proceedings in *quo warranto* brought by a United States Attorney for the removal of persons holding office contrary to the Fourteenth Amendment (*i. e.*, persons who had engaged in insurrection against the United States). Rev. Stat., §§ 563 (14), 629 (14), 1786. This grant of *quo warranto* jurisdiction to lower courts generally was repealed, however, by the Judicial Code of 1911, 36 Stat. 1087, 1168. And the duty imposed on United States Attorneys to bring *quo warranto* proceedings of the type authorized by the Revised Statutes was repealed by the 1948 revision of the Judicial Code. Act of June 25, 1948, 62 Stat. 869, 992–3.

In the meantime, Congress enacted in 1901 a code of law for the District of Columbia which specifically authorizes the United States District Court for the District of Columbia to issue *quo warranto* in the name of the United States on application of the Attorney General. Act of March 3, 1901, 31 Stat. 1189, 1419–20, District of Columbia Code (1951 ed.) § 16–1601; see *Newman* v. *United States ex rel. Frizzell*, 238 U. S. 537. The 1911 repeal of the *quo warranto* jurisdiction conferred by the Revised Statutes, together with the limited grant of such jurisdiction to the District Court for the District of Columbia alone, leaves no room for doubt that the district courts outside the District of Columbia have no *quo warranto* jurisdiction.

of these statutory provisions, however, justifies assumption of jurisdiction over the present proceeding.

28 U. S. C. 1651 (a), the "all-writs" statute, merely authorizes the federal courts to "issue all writs necessary or appropriate *in aid of their respective jurisdictions*" (emphasis added). The express terms of this statute thus make it plain that the statute does not confer any new jurisdictional authority; it simply confers ancillary jurisdiction to implement an already established jurisdiction. The statute, in other words, presupposes existing, competent jurisdiction and does not contain a new grant of judicial power. "While the section [*i. e.*, the "all-writs" section] augments the power of a court in cases of *existing jurisdiction, it in no wise expands or extends*" that jurisdiction (emphasis added). *Edgerly* v. *Kennelly*, 215 F. 2d 420, 422 (C. A. 7), certiorari denied, 348 U. S. 938; see, also, *Covington and Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109; *Knapp* v. *Lake Shore Railway Co.*, 197 U. S. 536; *Marshall* v. *Crotty*, 185 F. 2d 622, 626–627 (C. A. 1); *Petrowski* v. *Nutt*, 161 F. 2d 938 (C. A. 9), certiorari denied, 333 U. S. 842; *Amchanitzky* v. *Sinnott*, 69 F. 2d 97 (C. A. 2). Since petitioner does not and cannot point to any "existing" or "established" jurisdiction in aid of which it seeks to maintain the present *quo warranto* proceeding, its reliance on the "all-writs" statute is misplaced.

Equally inappropriate is petitioner's reliance on 28 U. S. C. 1345. That section confers jurisdiction on the district courts over "all civil actions, suits or proceedings commenced by the United States, or by

any agency or officer thereof." But this suit—which the United States Attorney General formally refused to institute (Pet. 22)—certainly is not one begun by the United States or by any of its officers or agencies.[3] Instead, as acknowledged at page 4 of the petition, this is an action "filed by the appellant State of Wisconsin" to test the legality of a federal regulation authorizing the First Federal to establish limited agency offices. While nominally filed in the name of the United States "ex rel. State of Wisconsin", there can be no doubt here that in essence this suit is not a suit by the United States but "in effect a suit by the State of Wisconsin." *First Federal Savings & Loan Ass'n* v. *Loomis*, 97 F. 2d 831, 834 (C. A. 7), certiorari granted, 305 U. S. 564, writ

---

[3] Since First Federal is acting as a corporation under the authority of the laws of the United States, rather than of Wisconsin, the only person legally qualified to challenge its status as a federal corporation is the Attorney General of the United States. 5 U. S. C. 309, 316; 28 U. S. C. 507; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278–284; *Booth* v. *Fletcher*, 101 F. 2d 676, 679–682 (C. A. D. C.), certiorari denied, 307 U. S. 628. Certainly, the Attorney General of Wisconsin has no authority to maintain this proceeding in the name of the United States. *Confiscation Cases*, 7 Wall. 454, 457; *United States ex rel. West* v. *Doughty*, Fed. Cas. No. 14,986 (C. C. S. D. N. Y.). In point here is the observation of Mr. Justice Johnson in *United States* v. *Morris*, 10 Wheat. 246, 301–302, affirming Fed. Cas. No. 15,816 (C. C. D. N. Y.):

> * * * How, in fact, the name of the United States comes at all to be used in this cause, is to me a mystery. * * * That the name of the United States should be used against its will, and an attorney for the United States nominated by a judge, to act where the attorney of the United States refuses to act, and that without any authority by statute, I acknowledge has excited my surprise.

dismissed on motion of petitioners, 305 U. S. 666; see *State ex rel. Cleary* v. *Hopkins Street B. & L. Asso.*, 217 Wis. 179, 257 N. W. 684, affirmed, 296 U. S. 315. 28 U. S. C. 1345 is therefore inapplicable here.

Nor is there any conflict between the decision below and *Ames* v. *Kansas*, 111 U. S. 449. To the extent that the *Ames* case is relevant, it holds simply that a *quo warranto* action properly brought in a state court may be removed to a federal court if the other requisite jurisdictional conditions are met. The present case, of course, was not a removed case; Wisconsin sought to invoke the original jurisdiction of the federal district court. Moreover, as we have already shown, this case does not meet the requirements of the jurisdictional statutes relied on by petitioner here.

Similarly, *Grace Line* v. *Panama Canal Company*, 243 F. 2d 844, 857 (C. A. 2), pending on writ of certiorari, Nos. 251, 252, this Term, not cited by petitioner, poses no conflict with the decision below. The holding in that case—which we believe in any event to be incorrect—seems predicated on a suggested distinction between mandatory injunctive relief and the extraordinary writ of mandamus. Certainly, the prerogative writ of *quo warranto*, sought to be invoked in the present case, is outside the scope of the type of injunctive or equitable relief normally available in district courts.

2. The fact that the result in the present case is supportable on a ground completely independent

of the jurisdictional question constitutes, we submit, an additional reason for not resolving any asserted conflict here. On the merits, this case turns on the validity of the Federal Home Loan Bank Board's Regulation, 24 C. F. R. 145.15, which authorizes the federal savings and loan associations to engage in the type of limited agency operations in question here.[4]

---

[4] It is appropriate at this point to note that three types of local or decentralized operations away from the home office are recognized by the Board's Regulations governing federal savings and loan associations. 24 C. F. R. 145.14 deals with the first or "branch" office type. 24 C. F. R. 145.15 describes the other two types: the general agency office and the limited agency office, the latter being the type involved in the present instance.

A branch office furnishes comprehensive savings and lending services. It may transact practically all of the business conducted at the home or main office. 24 C. F. R. 145.14. Thus, a branch office may receive applications for savings share accounts, open and close such accounts, accept deposits for such accounts, and allow withdrawals. It may also perform all services available at the main office in connection with loan applications, payments, and repayments. The only function confined to the main office and not exercisable by the branch is that of loan approvals. 24 C. F. R. 145.14.

The general agency office may engage in all of the banking services available at a branch office except that "no savings accounts may be opened at any agency * * *." 24 C. F. R. 145.15. No branch or general agency office may be established by a savings and loan association without prior approval of the Federal Home Loan Bank Board. 24 C. F. R. 145.14 and 145.15.

No such approval is required for establishment of the limited agency office—the type of operation conducted by First Federal and challenged here. A limited agency office is "limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions * * *." 24 C. F. R. 145.15, *infra*, p. 18. It is prohibited from performing all other banking or "savings" services available at the main, branch, or general agency offices.

Both courts below, as already noted, have recognized the validity of the Regulation (R. 67–68; Pet. 24). But even before those decisions, the power of the Federal Home Loan Bank Board to provide by regulation for establishment of branch offices had been explicitly sustained in uniform holdings of each of the three appellate courts passing on that question. *North Arlington Nat. Bank* v. *Kearny Fed. Sav. & L. Ass'n*, 187 F. 2d 564 (C. A. 3), certiorari denied, 342 U. S. 816; *First National Bank of McKeesport* v. *First Federal Sav. & L. Ass'n*, 225 F. 2d 33 (C. A. D. C.); *Springfield Institution for Sav.* v. *Worcester Fed. Savings & Loan Asso.*, 329 Mass. 184, 107 N. E. 2d 315, certiorari denied, 344 U. S. 884.

The Third Circuit's opinion in *North Arlington* flatly holds that a federal savings and loan association may establish branch offices under the Home Owners' Loan Act of 1933. 187 F. 2d 564, 565. In *Springfield Institution for Savings*, the Massachusetts court reiterated the view that the Act fully empowers the Home Loan Bank Board to provide for establishment of branch offices of savings and loan associations. 329 Mass. 184, 107 N. E. 2d 315. And in the *McKeesport* case, the Court of Appeals for the District of Columbia Circuit expressly adopted the "reasoning and conclusions" of the earlier holdings that the "Home Owners' Loan Act of 1933, as amended, authorizes the Federal Home Loan Bank Board to permit federal associations, regularly organized, to establish branch offices." 225 F. 2d 33, 35.

Since branch offices engage in broader and far more comprehensive operations than limited agency offices,

the decisions upholding the validity of branch offices necessarily sustain the validity of limited agency offices. As noted by the district court in this case, "the same reasoning and authority that established the power of the Board to create branches applies a fortiori with equal force and cogency to the Board's power in respect to the creation of agencies of limited function" (R. 65). Otherwise, as the court observed, there "would be a most curious result to find power on the major plane and deny it on the minor" (R. 65).

Petitioner's main argument on the merits, earlier in this litigation, has been based on Section 215.02 (20) of the Wisconsin statute, which prohibits state banking and savings institutions from operating agencies. But an identical argument was directly passed on in the *North Arlington* and *Springfield Institution* cases. In *North Arlington*, a New Jersey statute prohibited branch offices. In *Springfield Institution*, a Massachusetts statute prohibited them. In both cases, however, the court held that the limitations imposed on branch banking by the state statutes were inapplicable to federal savings and loan associations doing business in those states. 187 F. 2d 564 (C. A. 3); 329 Mass. 184, 107 N. E. 2d 315.

Wisconsin, of course, is free to adopt any policy it chooses with respect to agencies of state savings and loan associations. As to federal associations, however, Congress has specifically delegated the function of making that policy decision to the Federal Home Loan

Bank Board, not to the states (12 U. S. C. 1464 (a)). As stated in the *North Arlington* case:

> * * * Here is an area where the Board is given the duty and authority to make policy. It is supposed to find out what the practices of these institutions are and give primary consideration to the best ones.
>
> What is the practice with regard to branch offices? According to a committee report on a bill to amend the present act, only six states have statutes which prohibit the establishment of branch offices by building and loan associations. Thirteen states specifically authorize them and twenty-nine have not legislated upon the subject. Congress put the duty upon the Board to decide what was the best practice and to give consideration to it. The Board did so by authorizing branches under conditions set out in its Regulations. This, it seems to us, is a very strong argument for concluding that the authority to establish branch offices is vested in the Board, and by the very terms of the Congressional enactment. [187 F. 2d at 565–566.]

Similarly, the *Springfield* case recognizes a clear congressional purpose to make the Board's Regulations with respect to branches and agencies "of uniform application throughout the country", rather than to have them vary from state to state. 329 Mass. 184, 188–189, 107 N. E. 2d 315, 318; see *Franklin Nat. Bank* v. *New York*, 347 U. S. 373. Obviously, any attempt to engraft varying state limitations on these Regulations would frustrate this congressional purpose.

In short, the decision below is supportable on the ground that since the Regulation is plainly valid petitioner cannot make out a case on the merits. In parallel circumstances, this Court has refused to resolve an "asserted conflict" where, as here, the complaint cannot lead to ultimate relief or recovery. *Brooks* v. *Dewar*, 313 U. S. 354, 360.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.
MORTON HOLLANDER,
Attorney.

FEBRUARY 1958.

APPENDIX

1. The Home Owners' Loan Act of 1933 (Act of June 13, 1933, 48 Stat. 128, as amended, 12 U. S. C. 1461, *et seq.*) provides in pertinent part:

> * * * That this Act may be cited as the "Home Owners' Loan Act of 1933."

DEFINITIONS

Sec. 2. [12 U. S. C. 1462] As used in this Act—

(a) The term "Board" means the Home Loan Bank Board.

* * * * *

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 5 of this Act.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

Sec. 5. [12 U. S. C. 1464] (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

* * * * *

(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combina-

tion of homes and business property within fifty miles of their home office: * * *.

* * * * *

(d) (1) [12 U. S. C., Supp. IV, 1464 (d) (1)] The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in subsection (d) (2) hereof, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. * * *

* * * * *

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

* * * * *

2. The Regulations of the Federal Home Loan Bank Board, governing the operation of the federal savings and loan association, provide in pertinent part:

(a) 24 C. F. R. 145.13

Home office. The home office of a Federal association is the office established by such association's charter; such association shall be operated from its home office and all branch offices and agencies thereof shall be subject to

direction therefrom. A Federal association shall maintain at its home office a complete record of all business transacted at such office and control records of all business transacted at each of its branch offices and agencies.

(b) 24 C. F. R. 145.14

Branch office. No Federal association may establish or maintain a branch office without the prior written approval of the Board. Each application by a Federal association for permission to establish or maintain a branch office shall state the need for such branch office; the functions to be performed; the personnel and office facilities to be provided; the estimated annual volume of business, income, and expenses of such branch office; and shall be accompanied by a proposed annual budget of such association. Any business of a Federal association, except the approval of loans, may be transacted at a branch office, as authorized by its board of directors. A detailed record of all transactions of any branch office of a Federal association shall be maintained at such office and such control records as may be necessary for the proper conduct of such association's business shall be furnished by such branch office to its home office.

(c) 24 C. F. R. 145.15

Agency. Subject to prior approval by the Board as hereinafter provided, a Federal association may establish and maintain one or more agencies at which any agent of such association may transact its business to the extent authorized by its board of directors: *Provided,* That no loans may be approved and no savings accounts may be opened at any agency of a Federal association. Each application for approval by the Board of the establishment or maintenance of a place of business as an agency of a Federal association shall state the need for such agency; the functions to be performed;

the personnel and office facilities to be provided; and the estimated annual volume of business and expenses of such agency. A Federal association may, without approval by the Board, establish or maintain any agency the functions of which are limited to the servicing of loans and contracts, or to the management or sale of real estate owned, or to any combination of such functions; temporary or incidental agencies may likewise be established for individual transactions or for special, temporary purposes. An original record of all business of a Federal association transacted at any agency thereof shall be kept by such agency and such reports of business so transacted shall be made to a branch office or to the home office of such association as are required for the proper conduct and control of the association's affairs.